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No. 34

In the Supreme Court of the United States

OCTOBER TERM, 1946

GEORGE HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional and other provisions involved	2
Statement	2
Summary of argument	10
Argument	15
I. It has always been held that one of the incidents of a lawful arrest is the right to search the premises under the control of the person arrested for the instrumentalities of the crime of which he is accused, and that such a search is a reasonable one within the Fourth Amendment	17
A. The cases in this Court prior to 1927 establish that the right to search premises for instrumentalities of crime is an incident of a lawful arrest therein	20
B. There may be an exception permitting search of the premises for evidentiary papers incident to a lawful arrest in cases where a crime is actually being committed in the presence of the arresting officers	26
C. The *Go-Bart* and *Lefkowitz* cases have been uniformly understood to hold that a search of premises incident to a lawful arrest has as wide a scope as a search authorized by a search warrant, and is limited to the objects for which such a warrant could issue	40
D. The right to search premises under the accused's control for instrumentalities of crime as an incident to his lawful arrest is of ancient origin, and its recognition by the courts represents not an encroachment on constitutional protections but rather a reaffirmation of their original boundaries	44
II. The search was not a general exploratory search for evidence of crime	69
III. The search was not improper because it extended beyond the precise portion of the premises where petitioner was arrested	78
IV. The seizure of the Selective Service documents and their introduction in evidence were proper	83
Conclusion	90
Appendix	91

CITATIONS

Cases: Page

Adams v. *New York*, 192 U. S. 585 ..... 84, 85
Agnello v. *United States*, 269 U. S. 20 ..... 10, 13, 19, 23, 24, 43, 74, 79
Argetakis v. *State*, 24 Ariz. 599 22
Banks v. *Farwell*, 21 Pick. (Mass.) 156 53
Bennett v. *United States*, 145 F. 2d 270, certiorari denied, 323 U. S. 788 86
Boyd v. *United States*, 116 U. S. 616 ..... 17, 48
Browne v. *United States*, 290 Fed. 870 48
Byars v. *United States*, 273 U. S. 28 74
Carawon, Rev. George W., Trial of, 6 Am. St. Tr. 514 51
Carroll v. *United States*, 267 U. S. 132 ..... 10, 18, 19, 22, 23, 43, 48, 56
Closson v. *Morrison*, 47 N. H. 482 52
Colt, John C., Trial of, 1 Am. St. Tr. 455 51
Commercial Exchange Bank v. *McLeod*, 65 Iowa 665 52
Commonwealth v. *Grasse*, 80 Pa. Super. 480 22
Commonwealth v. *Phillips*, 224 Ky. 117 22
Connell v. *State*, 215 Ind. 318 42
Cunningham, Emma, Trial of, 5 Am. St. Tr. 90 52
Davis v. *United States*, No. 404, Oct. T. 1945, decided June 10, 1946 ..... 16, 19, 38, 44, 45, 64, 76
De la Motte, Francis, Trial of, 21 How. St. Tr. 687 64
Dillon v. *O'Brien*, 20 L. R. Ir. 300, 16 Cox C. C. 245 ..... 11, 38, 56, 57, 58, 60, 62, 63, 75
Elias v. *Pasmore*, [1934] 2 K. B. 164 ..... 12, 62, 63, 65
Elg v. *State*, 129 Tex. Crim. 29 42
Entick v. *Carrington*, 19 How. St. Tr. 1030 ..... 42, 49, 60, 63, 65, 68
Fogg v. *Worster*, 19 N. H. 503 52
Foley v. *United States*, 64 F. 2d 1 40
Furlong v. *United States*, 10 F. 2d 492 ..... 22, 76
Getchell v. *Page*, 103 Me. 387 55
Go-Bart Co. v. *United States*, 282 U. S. 344 ..... 10, 32, 37, 38, 39, 40, 44, 47, 48, 65, 68, 76, 77, 80, 81
Gompers v. *United States*, 233 U. S. 604 68
Gouled v. *United States*, 255 U. S. 298 ..... 37, 84
Grau v. *United States*, 287 U. S. 124 74
Hart, Patrick, Trial of, 26 How. St. Tr. 388 49
Hilsinger v. *United States*, 2 F. 2d 241, certiorari denied, 266 U. S. 622 86
Holker v. *Hennessey*, 141 Mo. 527 52
Houghton v. *Bachman*, 47 Barb. (N. Y.) 388 ..... 53, 54
Hurn, Ex parte, 92 Ala. 102 52
Ings, James, Trial of, 33 How. St. Tr. 957 50
In re 14 East 47th Street, 65 F. 2d 289 ..... 40, 86
Keeler v. *Myers*, 119 Oreg. 517 22
Kennedy, Thomas, Trial of, 26 How. St. Tr. 354 64
Kenniston, Levi and Laban, Trial of, 14 Am. St. Tr. 237 50
Kneeland v. *Connally*, 70 Ga. 424 53

Cases—Continued

	Page
Kurtz v. *Moffitt*, 115 U. S. 487	19
Landau v. *United States Attorney*, 82 F. 2d 285	40
Lee v. *United States*, 274 U. S. 559	19
Lefkowitz v. *United States Attorney*, 52 F. 2d 52	37
Marron v. *United States*, 8 F. 2d 251	81
Marron v. *United States*, 275 U. S. 192	10, 26, 27, 28, 33, 36, 37, 73, 79, 80, 85, 86
Matthews v. *Correa*, 135 F. 2d 534	78, 81
Mattus v. *United States*, 11 F. 2d 503	22
Milam v. *United States*, 296 Fed. 629, certiorari denied, 265 U. S. 586	86
Morton v. *United States*, 147 F. 2d 28, certiorari denied, 324 U. S. 875	11, 67
Newman v. *People*, 23 Colo. 300	53
North v. *People*, 139 Ill. 81	52
Nueslein v. *District of Columbia*, 73 App. D. C. 85, 115 F. 2d 690	67
O'Connor v. *Bucklin*, 59 N. H. 589	52
Papani v. *United States*, 84 F. 2d 460	19, 40
Paper v. *United States*, 53 F. 2d 184	86, 87
Parks v. *United States*, 76 F. 2d 709	40
Patton v. *State*, 43 Okla. Crim. 435	22
People v. *Cona*, 180 Mich. 641	22
Reitsnyder v. *Lee*, 44 Iowa 101	52
Robinson, Richard P., Trial of, 12 Am. St. Tr. 426	50
Rusher v. *State*, 94 Ga. 363	53
Sayers v. *United States*, 2 F. 2d 146	48, 81
Sheares, Henry and John, Trial of, 27 How. St. Tr. 255	49
Shelton v. *United States*, 50 F. 2d 405	81
Shaw v. *United States*, 155 F. 2d 628, certiorari denied June 10, 1946 (No. 1285, Oct. T. 1945)	44
Smith v. *Jerome*, 47 Misc. 22	54
Spalding v. *Preston*, 21 Vt. 9	52
Spencer, Bathsheby, et al., Trial of, 2 Am. St. Tr. 175	50
State v. *Adams*, 103 W. Va. 77	22
State v. *Conner*, 59 Idaho 695	42
State v. *Eggus*, 145 Wash. 4	22
State v. *Gorman*, 196 Iowa 237	22
State v. *Long*, 336 Mo. 638	42
State v. *Robbins*, 124 Ind. 308	53
State v. *Rosser*, 162 Ore. 293	42
Steele v. *United States (No. 1)*, 267 U. S. 498	84
Stuart v. *Harris*, 369 Ill. App. 668	52
Swan v. *United States*, 295 Fed. 921	81
Takahashi v. *United States*, 143 F. 2d 118	40
Taylor v. *United States*, 286 U. S. 1	36
Thatcher v. *Weeks*, 79 Me. 547	52
Throckmorton, Arthur, Trial of, 33 How. St. Tr. 682	50

Cases—Continued

	Page
United States v. *Bell*, 48 F. Supp. 386	41
United States v. *Camarota*, 278 Fed. 388	87
United States v. *Charles*, 8 F. 2d 302	87
United States v. *Davis*, 151 F. 2d 140	38
United States v. *Derman*, 66 F. Supp. 511	82
United States v. *Feldman*, 104 F. 2d 255	48, 81
United States v. *Gowen*, 40 F. 2d 593	28, 31, 37, 38
United States v. *Jankowski*, 28 F. 2d 800	86
United States v. *Kirschenblatt*, 16 F. 2d 202	24, 25, 28, 37, 47
United States v. *Lefkowitz*, 285 U. S. 452	10, 34, 36, 37, 38, 39, 40, 43, 44, 47, 48, 63, 65, 71, 72, 76, 80, 81
United States v. *Lindenfeld*, 142 F. 2d 829, certiorari denied, 323 U. S. 761	40, 41, 66, 81
United States v. *Mills*, 185 Fed. 318, writ of error dismissed, 220 U. S. 549	55
United States v. *Old Dominion Warehouse*, 10 F. 2d 736	86, 87
United States v. *Poller*, 43 F. 2d 911	22, 28, 29, 37, 48, 81
United States v. *Seltzer*, 5 F. 2d 364	87
United States v. *71.41 Ounces Gold Filled Scrap*, 94 F. 2d 17	81
United States v. *Stappenback*, 61 F. 2d 955	40
United States v. *Thomson*, 113 F. 2d 643	40
United States v. *Tot*, 131 F. 2d 261, reversed on other grounds, 319 U. S. 463	41, 42, 43
United States v. *Two Soaking Units*, 48 F. 2d 107, certiorar denied, 284 U. S. 627	86
Weeks v. *United States*, 232 U. S. 383	10, 11, 19, 20, 21, 52, 54, 56
Woolfolk v. *State*, 81 Ga. 551	52
Wiggin v. *State*, 28 Wyo. 480	22
Zap v. *United States*, No. 489, Oct. T. 1945, decided June 10, 1946	84
Constitutional provision, statutes and regulation:	
Fourth Amendment	17, 18, 48, 66, 68, 91
Act of August 27, 1935, c. 740, sec. 201, 49 Stat. 877, 18 U. S. C. 53a	43
Criminal Code:	
Sec. 48	3, 92
Sec. 215	5, 92
National Motor Vehicle Theft Act (18 U. S. C. 408)	77
National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, as amended by the Act of August 3, 1939, c. 413 § 1, 53 Stat. 1178 (18 U. S. C. 415):	
Sec. 3	5, 93
Search Warrant Act, Title XI of the Espionage Act of June 15, 1917, 40 Stat. 228, 18 U. S. C. 611, *et seq.*	91
Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894-895 (50 U. S. C. App. 311):	
Sec. 11	3, 93
18 U. S. C. 264, 267	77

Constitutional provision, statutes and regulations—Continued Page
18 U. S. C. 277 77
19 U. S. C. 1593 78
21 U. S. C. 174 77
26 U. S. C. 2810(a) 77
26 U. S. C. 3224(c) 77
31 U. S. C. 443 77
Selective Service Regulation 623.61–2 ..... 3, 83, 94
State statutes:
N. C. Laws of 1868–69, c. 178, sub-ch. 3, § 38 51
3 N. Y. Rev. Stat. (5th ed. 1859) pp. 1036, 1040 52
Miscellaneous:
32 A. L. R. 697–700 21
51 A. L. R. 424–439 21
Annals of Congress, 1st Cong., 1st sess., p. 754 18
Hale, *Pleas of the Crown* v. 2, pp. *114–119 ..... 63, 64
Hawkins, *Pleas of the Crown* (6th ed.), v. 2, pp. 137–139 64
H. Rep. 1601, 74th Cong., 1st sess., p. 5 64
Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, Johns Hopkins University Studies in Historical and Political Science, Series LV, No. 2 (1937) 18
S. Rep. 1330, 74th Cong., 1st sess., p. 5 44

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OPINION BELOW

The opinion of the circuit court of appeals (R. 145–152) is reported at 151 F. 2d 837.

JURISDICTION

The judgment of the circuit court of appeals was entered October 26, 1945 (R. 152), and a petition for rehearing was denied November 28, 1945 (R. 167). The petition for a writ of certiorari was filed December 28, 1945, and was granted June 10, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Ap-

peals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether officers, who have arrested a person in his home under a valid warrant of arrest, may as incident to the arrest, search the premises for the instrumentalities or means of committing the crime of which the prisoner is accused, although at the time the officers do not see any crime being committed in their presence.

2. Whether the search of petitioner's home was a general exploratory search for evidence.

3. Whether a search incident to arrest must be limited to the room in which the accused is arrested.

4. Whether property accidentally uncovered during the search, which it was unlawful for petitioner to have in his possession but which related to a wholly different offense may be lawfully seized and used as evidence in a prosecution of the prisoner for such different offense.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The constitutional and other provisions involved are set forth in the Appendix, pp. 91–94, *infra*.

STATEMENT

After a trial by the court without a jury, petitioner was convicted in the District Court for the

Western District of Oklahoma on sixteen counts of a nineteen-count indictment (R. 34, 36). Of those counts on which petitioner was convicted, seven (counts 4 to 10, inclusive, R. 3–9) charged that on July 20, 1944, he unlawfully altered a Notice of Classification card in violation of Section 11 of the Selective Training and Service Act of 1940 and Selective Service Regulation 623.61–2 (Appendix, pp. 93–94, *infra*); seven (counts 12, and 14 to 19, inclusive; R. 10–11, 12–16) charged that on the same date he unlawfully had in his possession an altered Notice of Classification card in violation of Section 11 of the Act and Section 623.61–2 of the Regulations; one (count 2; R. 2–3) charged that on the same date he concealed eight Notice of Classification cards and eleven Registration Certificates, which had been stolen from a local draft board and which he knew had been stolen, in violation of Section 48 of the Criminal Code (Appendix, p. 92, *infra*); and one (count 3; R. 3) charged that on the same date he had these documents in his possession with intent to convert them to his own use and gain, in violation of Section 48.[1] Petitioner was sentenced to imprisonment for a term of five years on each count, the sentences to run concurrently (R. 36–

[1] Petitioner was acquitted on count 1, which charged theft of government property; while count 11, which charged alteration of a Notice of Classification card, and count 13, which charged possession of an altered card, were dismissed (R. 1–2, 9–10, 11–12, 36).

37). On appeal to the Circuit Court of Appeals for the Tenth Circuit, the judgment of conviction was affirmed (R. 145–152).

At the trial the Government introduced in evidence the Notice of Classification cards and the Registration Certificates which form the basis of petitioner's conviction (Gov. Ex. 1–18; R. 90, 127–131). The only question here involved is whether these documents were obtained as the result of an illegal search and seizure. Prior to the trial, petitioner moved to suppress them as evidence (R. 18–32). The motion was denied (R. 34–35, 45). It was renewed several times during the trial, but was again denied (R. 35–36, 89–90, 123). The facts relating to the search and seizure appear in petitioner's motion to suppress and in the testimony of witnesses at the trial who were called by the Government to give evidence bearing on the search and seizure (R. 18–32, 62–89, 99–123).[2] The evidence relating thereto may be summarized as follows:

On July 15, 1944, a United States Commissioner, upon complaint of a special agent of the

[2] Petitioner filed a written motion to suppress December 4, 1944 (R. 18–32). The record does not disclose that the Government presented any matter in opposition. The motion was heard, presumably on the basis of petitioner's papers, on December 8, 1944, just before the case was called for trial, when it was denied (R. 34–35). The record does not indicate the occasion for further inquiry into the matter at the trial, but, in any event, after one witness testified concerning the merits of the case (R. 47–62), the Government called two

F. B. I., issued two warrants authorizing any special agent of the F. B. I. to arrest petitioner and one C. R. Moffett (R. 22–28). One of these warrants charged that petitioner and Moffett on or about March 7, 1944, had in violation of Section 215 of the Criminal Code (Appendix, pp. 92–93, *infra*), caused to be placed in the mails in execution of a scheme to defraud a letter addressed to the Guaranty Trust Company of New York for the purpose of cashing a forged check for $25,000, "drawn on the Mudge Oil Company and signed 'The Mudge Oil Co., E. W. Mudge, Jr., V. P., S. H. Newbery, Treas.', said check on the reverse side thereof containing the endorsement, 'American Oil & Gas Co., Blackwell, Oklahoma, by C. R. Moffett, Owner'" (R. 24–25). The second warrant charged that petitioner and Moffett on or about March 7, 1944, had, with intent to defraud certain banks and the Mudge Oil Company, caused the $25,000 forged check to be transported in interstate commerce from Blackwell, Oklahoma, to Pittsburgh, Pennsylvania, in violation of Section 3 of the National Stolen Property Act (Appendix, p. 93, *infra*) (R. 27–28).

At about 1:30 p. m., on July 20, 1944, Special Agents Melvin and Ware of the F. B. I., went to

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of the F. B. I. agents who had participated in the search and seizure (R. 62–89), and at a subsequent date, it called two other witnesses, whose testimony bore on those subjects (R. 97–123). Petitioner's motion to suppress was received as an exhibit at the trial (R. 90).

petitioner's apartment, at 2308 North Ellison Street, Oklahoma City, Oklahoma. They had the warrants of arrest with them (R. 63–64, 77, 83–84). Melvin identified himself to petitioner, showed him the warrants, and placed him under arrest (R. 64). The arrest was made in the living room of the apartment, which contained, in addition, a bedroom, kitchen, and bathroom (R. 69, 71). Petitioner was handcuffed (R. 70, 84), and the agents proceeded to search the apartment in company with three other agents who had arrived in the meantime (R. 64–65, 84). The agents testified that they were searching for "two $10,000 cancelled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company,"[3] "for any means that might have been used to commit these two crimes [i.e., the offenses charged in the warrants of arrest], such as burglar tools, pens, or anything that could be used in a confidence game of this type"; "we thought we might find a photostatic copy [of the $25,000 check]"; "anything which would indicate a violation of the mail fraud statute and the

[3] An employee of the Mudge Oil Company testified that on March 6, 1944, she had returned to the company's offices after business hours. She unlocked the door, and came across a man in a room where the company's checks were kept. This man was the petitioner. (R. 400–406.) A friend of this employee, who was with her on this occasion, also identified petitioner as the man they saw in the office (R. 110–113, 116, 118).

National Stolen Property Act"; "we were searching for two blank checks and also searching for writing materials, burglar tools or anything of that nature which may have been used in perpetrating the crimes alleged" (R. 65–66, 69, 77–78, 84–85). Melvin, who was in charge of the search, described it as being "as thorough as we could make it"; it extended to each room of the apartment, and to such articles as the mattress of the bed, underneath the carpets, and the clothing closets (R. 71–72, 86). The agents stayed at the apartment until about 6:30 p. m. (R. 71).[1] The agents did not find any checks (R. 69). They did find and take away seven pens, tissue paper, and 27 pieces of celluloid (R. 79–80, 86–87). The latter were found wrapped in a towel in a drawer of the dresser in the bedroom (R. 79–81, 87). Ware testified that they could be used for picking a lock (R. 81–82). According to petitioner, as stated in his motion to suppress, the agents seized "blank stationery of various hotels, blank ruled sheets of paper, several old, broken and obsolete fountain pens, expense bills and receipts, personal mail letters, bill of sale for defendant's automobile, note books, address books,

[1] Apparently the search did not continue until that time. Melvin testified that they remained until 6:30 p. m., because they had encountered some difficulty in locating a commissioner in connection with arraigning petitioner (R. 71, 73). Petitioner in his affidavit asserted that the search continued until 8:00 p. m. (R. 20).

and some mineral deeds, * * * that the said articles * * * were wrapped in a package and carried away * * * in a package approximately one foot by one foot by two feet in size" (R. 20).

Ware, who had searched the dresser in which the celluloid was found, also found at about 5:00 p. m. in a drawer of the dresser, underneath some clothes, a sealed envelope marked "George Harris, personal papers" (R. 20, 66, 71, 77–78, 82–83, 85–86, 135; see also R. 66–67, 72). Ware opened the envelope, and in it were found the Notice of Classification cards and Registration Certificates involved (R. 66–67, 77, 83, 86).

At about 2:00 p. m., Melvin left the apartment for the purpose of securing a warrant to search petitioner's automobile and his office (R. 19, 70, 72). Melvin secured a warrant authorizing him to make a search of the automobile and office for "checks of The Mudge Oil Company and other forms of checks and other paraphernalia and the instrumentalities used in the perpetration of what is commonly known as the 'confidence game', or in connection with the making of, and uttering of, false, forged and counterfeit instruments of credit, and gasoline mileage ration books, * * * issued in violation of orders issued * * * by the Office of Price Administration" (R. 28–32). A search of the automobile and office was made (R. 20–21, 68, 73). No checks were found (R.

73). A letter was taken from the office (R. 73). According to petitioner, there were taken from the automobile "paid expense bills for repairs on said automobile; notebooks, and other personal belongings" (R. 21).

The only question considered by the circuit court of appeals was whether the search and seizure were reasonable (R. 145).[5] The court concluded that the search and seizure were justifiable as an incident to petitioner's lawful arrest. It stated that the record did not support petitioner's contention that the search was "general, exploratory and evidentiary"; that "the officers did not enter to explore—to see what they could find. They entered to execute a valid warrant of arrest" (R. 149); that the search for the two $10,000 checks which had been stolen from the Mudge Oil Company was under the circumstances a proper object of search; and the search for them did not exceed the bounds of reasonableness (R. 149–150). Finally, the court concluded that the seizure of the cards was proper, because officers legally searching as incident to a lawful arrest are entitled to seize "the instruments or the means of committing another and wholly unrelated offense unexpectedly uncovered by such search" (R. 150–152).

[5] The district court in ruling that the search and seizure were lawful did not give any reasons for its ruling.

SUMMARY OF ARGUMENT

1. A. The decisions of this Court prior to 1927 establish that, incident to a lawful arrest for crime, the arresting officers may, without additional judicial authorization, search the premises where the arrest took place for instrumentalities of the crime for which the defendant was arrested. *Weeks* v. *United States*, 232 U. S. 383, 392; *Carroll* v. *United States*, 267 U. S. 132, 158; *Agnello* v. *United States*, 269 U. S. 20, 30. But the search may not extend beyond the premises in which the arrest takes place. *Agnello* v. *United States*, *supra*, at 32–33. Except as to the search of the defendant's person, which is recognized to be unlimited in scope, the search of premises is as broad as, though no broader than, the search which could have been authorized by a search warrant.

B, C. In 1927, this Court in *Marron* v. *United States*, 275 U. S. 192, seems to have permitted a general exploratory search of premises, for papers merely evidencing crime, as incident to a lawful arrest. But later decisions—*Go-Bart Co.* v. *United States*, 282 U. S. 344, and *United States* v. *Lefkowitz*, 285 U. S. 452—condemned exploratory and general searches incident to an arrest, searches made simply to find papers evidencing defendant's guilt. If the *Marron* case has validity today, it is limited to situations where a crime is actually being committed in the presence of the arresting officers. But nothing in the *Go-Bart* or

Lefkowitz cases restricts the right of arresting officers, consequent upon and incident to a lawful arrest, to search the premises on which the arrest takes place for the fruits and instrumentalities of the crime for which the arrest was made. Both Congress and the lower federal courts have so understood those decisions.

D. The right to search, not only the defendant's person on arrest, but in addition the premises under his control for instrumentalities of the crime for which he is arrested, all as incident to his lawful arrest, is of ancient origin. Its recognition by the courts represents no encroachment on constitutional protection but rather a reaffirmation of the original boundaries of such protection.

The search of premises incident to an arrest is a practice that is reflected in the actual records of cases reported in *Howell's State Trials* and in the *American State Trials*. While the reported American appellate decisions prior to *Weeks* v. *United States*, 232 U. S. 383, *supra*, do not, for the most part, discuss the matter, it seems clear that the *Weeks* case was giving recognition to an actual practice so axiomatic that it had rarely been the subject of legal controversy. In the leading case of *Dillon* v. *O'Brien*, 20 L. R. Ir. 300, 16 Cox C. C. 245, several times cited with approval by this Court, the right to search premises and seize papers incident to an arrest was based on the state's interest in bringing to justice persons

whose probable guilt had already been established to the point where their arrest could be justified; and *Entick* v. *Carrington*, 29 How. St. Tr. 1030, was held not controlling since there there was only suspicion and the entry into the premises could not be independently justified. Indeed, as a matter of history, exploratory searches of premises incident to an arrest would appear to be reasonable searches, and in England today the limitations of the *Lefkowitz* case are not law. *Elias* v. *Pasmore*, [1934] 2 K. B. 164.

Whatever its precise historical origins, the right to search premises for the instrumentalities of crime as an incident to a lawful arrest for that crime has been consistently recognized by judges and legislators. A search incident to an arrest carries with it none of the evils of general warrants or writs of assistance. The search is limited to one particular time, to one particular place, and to particular objects, viz., the fruits or instrumentalities of the crime for which the accused is arrested. The existence of probable cause must first be established as grounds for the arrest. There is thus no possibility that a search incident to an arrest can be extended to cover a general search on mere suspicion alone, which was the particular evil at which the Fourth Amendment was directed.

2. The search here was not a general exploratory search for evidence of petitioner's guilt of crime. The record shows that the objects of the

search were the instrumentalities of the offenses for which petitioner was arrested, viz., the two $10,000 cancelled checks used to commit mail fraud; writing materials; and burglar's tools. The fact that the agents proceeded to make a search for these objects after they had effected petitioner's arrest does not establish that their purpose in entering the apartment was to make a general exploratory search rather than to execute the warrant of arrest. Nor is it significant that during the course of the search the agents secured a warrant to search petitioner's automobile and office upon an affidavit which might have been inadequate for that purpose because it failed to set forth the ground of the agents' belief that petitioner had committed the crime. The warrant or arrest shows that probable cause sufficient to satisfy a judicial officer did in fact exist. Indeed, the circumstance that the agents sought such a warrant indicates that they felt themselves bound by *Agnello* v. *United States*, 269 U. S. 20, which condemned searches of premises other than those in which the arrest took place.

Considering the nature of the objects sought, the search was clearly reasonable; it was no more extensive than was necessary to uncover the articles which were the instrumentalities of the crime for which petitioner was arrested. A search otherwise reasonable does not become unreasonable simply because it is thorough; a search pre-

destined to failure is not the only one which satisfies the Fourth Amendment.

3. The search was not improper because it extended beyond the living room of petitioner's apartment where the actual arrest took place. The cases in this Court indicate that, if the search incident to an arrest is otherwise lawful, it may extend to the entire premises under the control of the arrested person. The lower federal courts have consistently assumed that the area of search is not limited merely to the room in which the arrest is made. And it would be highly artificial to restrict the area of search to the particular portion of the premises where the arrest chances to take place. If the defendant is lawfully arrested in a bathroom or a clothes closet, it certainly cannot follow that only the bathroom or the closet may then be searched for the instrumentalities of his offense.

4. The seizure of the eight Notice of Classification cards and the eleven Registration certificates, petitioner's possession of which formed the basis of his conviction in this case, was proper, as was their introduction in evidence. The agents were not searching for these documents. They did not know when they embarked on the search that petitioner had them in his possession. It is clear that it was unlawful for petitioner to have the documents in his possession. The decisions of this Court and the lower federal courts

establish that if, in the course of a valid search, contraband is uncovered, i. e., an article the very possession of which is a crime, it may be seized. And since the documents here were lawfully taken, they could be used to prosecute petitioner for an offense unrelated to that upon which the search was founded.

ARGUMENT

As has been set forth in the Statement, *supra*, pp. 4–6, petitioner was arrested at his apartment by agents of the F. B. I., whose authority proceeded from warrants charging that petitioner and one Moffett had violated the Mail Fraud Statute and the National Stolen Property Act. The specific allegations of the warrants were that petitioner and Moffett, in execution of a scheme to defraud, had placed in the mail a letter which contained a forged $25,000 check purporting to have been made by the Mudge Oil Company and had caused this check to be transported in interstate commerce. The lawfulness of petitioner's arrest is not questioned. Immediately after they arrested him, the agents, who did not have a search warrant, proceeded to make a thorough search of the four rooms of petitioner's apartment in order to find, according to their testimony, two cancelled $10,000 checks which had been issued by the company and subsequently stolen from its offices, and burglar's tools. Petitioner had had an opportunity to steal the checks (p. 6, *supra*). The

agents did not find any checks, but after searching for several hours, they found in a dresser drawer in the bedroom numerous pieces of celluloid capable of being used to pick locks and also an envelope which contained a number of Selective Service Registration Certificates and Notice of Classification cards (pp. 7–8, *supra*). Petitioner's possession of these documents formed the basis for his conviction in this case.

Petitioner attacks on several grounds the holding of the circuit court of appeals that the search and seizure were reasonable. He argues (1) that the search was exploratory to find evidence of his guilt of crime (Pet. 4, 14–15, 15–21, 38); (2) that a search incident to an arrest may not extend beyond the person of the accused or "things" in his "immediate" control (Pet. 4, 15, 21–26); (3) that under the circumstances disclosed by the record, the agents did not have "probable cause" for securing a search warrant, and, therefore, they had no right of search incident to arrest (Pet. 4, 15, 26–28); and (4) that "evidence" discovered during the course of a search may not be utilized to convict an accused of an offense unrelated to the charge on which he was arrested and which supported the search (Pet. 4–5, 15, 28–37).

Our study of the case, in the light of some judicial doubts recently expressed,[3] has led us to

[3] See Frankfurter, J., dissenting, in *Davis* v. *United States*, No. 404, Oct. T. 1945, decided June 10, 1946, at pp. 12–15 of slip opinion, quoted at length below, pp. 44–47.

the view that it presents another question, not advanced directly by petitioner, namely, whether, as incident to an arrest in a private dwelling upon warrants charging a use of the mails to defraud and the transportation of a forged check in interstate commerce, a search of the dwelling for the instrumentalities of the offenses charged in the warrants of arrest is permissible where, upon making the arrest, there is nothing to indicate to the officers that any offense is being committed on the premises. We shall first state our views on this matter, and then discuss petitioner's more specific contentions.

I

IT HAS ALWAYS BEEN HELD THAT ONE OF THE INCIDENTS OF A LAWFUL ARREST IS THE RIGHT TO SEARCH THE PREMISES UNDER THE CONTROL OF THE PERSON ARRESTED FOR THE INSTRUMENTALITIES OF THE CRIME OF WHICH HE IS ACCUSED, AND THAT SUCH A SEARCH IS A REASONABLE ONE WITHIN THE FOURTH AMENDMENT

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The historical background of this Amendment is set forth in *Boyd* v. *United States*, 116 U. S.

616.[7] The particular grievance which led to the adoption of the amendment was the English practice of issuing general warrants unlimited as to person, place, or time, by which officers were allowed to arrest or search any person or place on mere suspicion alone. That generality was the specific evil toward which the amendment was directed is shown by the fact that, as originally proposed, it read as follows (*Annals of Congress*, 1st Cong., 1st sess., p. 754):

> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.

The first American precedent for the amendment, that in the Virginia Bill of Rights, was limited to a prohibition against general warrants alone. Lasson, *op. cit.*, p. 79.

The Fourth Amendment has never been interpreted as excluding all searches and seizures without a warrant. Although it guarantees protection of the "person," the right to arrest, to seize the person, without a warrant under circumstances recognized as reasonable under common law principles, is well established. See *Carroll* v. *United*

[7] For a more detailed treatment, see Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, Johns Hopkins University Studies in Historical and Political Science, Series LV, No. 2 (1937).

States, 267 U. S. 132, 156–157; *Kurtz* v. *Moffitt*, 115 U. S. 487, 504. Similarly, this Court has held that a search and seizure of property without a warrant may be reasonable under certain circumstances, e. g., where there is probable cause to believe that a moving vehicle is being used in the commission of a crime. *Carroll* v. *United States*, *supra*, 267 U. S. at 149; *Lee* v. *United States*, 274 U. S. 559, 563. And, as we point out more in detail below, it has always been held by this Court that a dwelling house may lawfully be searched without a search warrant as an incident to a lawful arrest therein. *Agnello* v. *United States*, 269 U. S. 20, 30; *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392.

The court below, relying on these cases, likewise held that the right to search without a warrant the premises under the control of the person arrested at the time of his arrest is as well established as the right to arrest without a warrant or the right to search a moving vehicle on the basis of probable cause without a warrant. The theory seems to have been, as the Circuit Court of Appeals for the Ninth Circuit phrased it in *Papani* v. *United States*, 84 F. 2d 160, 162, that "an arrest serves the function of a search warrant." It is because the dissenting opinion in *Davis* v. *United States*, No. 404, Oct. T. 1945, decided June 10, 1946, questions the historical valid-

ity of this assumption that we feel impelled to explore the matter now.

A. *The cases in this Court prior to 1927 establish that the right to search premises for instrumentalities of crime is an incident of a lawful arrest therein.*

In 1914, in *Weeks* v. *United States*, 232 U. S. 383, this Court first held that the fruits of an illegal search were not admissible in evidence. Yet in this very case, it was assumed that there was a right to search upon arrest, not only the person of the accused, but also the premises under his control. In stating the questions excluded from its consideration this Court said (232 U. S. at 392):

> What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, § 211; Wharton, Crim. Plead. and Practice, 8th ed., § 60; *Dillon* v. *O'Brien and Davis*, 16 Cox C. C. 245. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise

> competent, were obtained—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused.

This recognizes as a separate, well established category,[8] independent of the right to search the person, the right to search for instrumentalities of the crime "upon his arrest within the control of the accused." The Court cites no cases for this proposition, considering it to be both recognized and settled.

Soon after the *Weeks* doctrine became established, there followed the passage of the National Prohibition Act; the impact of the one on the other focused attention on the problem of searches and seizures, and made that one of the burning constitutional issues of the 1920's. We shall not undertake to list, analyze, or classify the clouds of decisions on this subject during the Prohibition Era. It seems sufficient to note that the right to search, as incident to an arrest, not only the person but the premises of the person arrested as well, was widely recognized by both the state and federal courts.[9] There was some disagreement in the decisions as to the area subject to search upon arrest.[10] But with few ex-

[8] It is evident that the court was excluding from consideration situations which were not open to question.

[9] See, for collections of cases, 32 A. L. R. 697–700; 51 A. L. R. 424–439.

[10] See 32 A. L. R. 697–700.

ceptions (see *Wiggin* v. *State*, 28 Wyo. 480 (1922); *State* v. *Adams*, 103 W. Va. 77 (1927)) there was no discussion of possible differences between the right to search where a crime was actually being committed, and search on arrest for a past crime, and no analytical distinction between the right to seize property open to view and the right to search for concealed instrumentalities of a crime. One of the first state decisions following the *Weeks* case, *People* v. *Cona*, 180 Mich. 641 (1914), upheld a search for as well as a seizure of the instrumentality of a past crime, i. e., a gun found in the defendant's bureau drawer when he was arrested in his home for the crime of murder. Other federal and state decisions of the period also upheld searches as incident to a lawful arrest for a past crime. *Mattus* v. *United States*, 11 F. 2d 503 (C. C. A. 9); *Furlong* v. *United States*, 10 F. 2d 492 (C. C. A. 8); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2); *Argetakis* v. *State*, 24 Ariz. 599 (1923); *Commonwealth* v. *Grasse*, 80 Pa. Super. 480 (1923); *Commonwealth* v. *Phillips*, 224 Ky. 117 (1928); *State* v. *Gorman*, 196 Iowa 237 (1923); *Patton* v. *State*, 43 Okla. Crim. 436 (1929); *Keeler* v. *Myers*, 119 Ore. 517 (1926); *State* v. *Evans*, 145 Wash. 4 (1927).

The important decisions of that period are the decisions of this Court. In *Carroll* v. *United States*, 267 U. S. 132, it was held that a warrant was not necessary to justify the search of a mov-

ing vehicle, but that it was sufficient if the searching officer had probable cause for his belief that the contents of the automobile were offending the law. In the course of that decision, this Court observed (267 U. S. at 158):

> When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.

In *Agnello* v. *United States*, 269 U. S. 20, decided in October 1925, agents looking through the windows of the home of one Alba saw Frank Agnello produce a number of packages for delivery to a government agent, who had previously arranged to purchase narcotics, and saw the latter hand over money to Alba. The agents then rushed in and arrested all the defendants. They found some of the packages on the table where the transaction had occurred, found others in another room, and still others in Frank Agnello's pockets. Some of the agents then went to Angello's home, some blocks away, searched it, and in his bedroom found a can of cocaine. The searches and seizures at Alba's home covered the entire premises;[1] they were held proper as inci-

[1] There were four rooms. R. 62, No. 6, Oct. T. 1925. The agents entered through the kitchen, and found the packages on the table in the dining room, where the men were arrested, and in one bedroom. R. 129, 219. One agent testified that he "searched all around the place." R. 219.

dent to the arrest, the Court saying (269 U. S. at 30):

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.

But the search and seizure at Agnello's home were held to be unlawful, on the ground that the right to search as incident to an arrest did not extend to places removed from the place of arrest. In this connection, the Court said (269 U. S. at 32, 33):

> While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. * * * Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant.

That there were limitations on the right to search was still clear; even as an incident to a lawful arrest, officers could not make a general exploratory search for evidence. See *United States* v. *Kirschenblatt*, 16 F. 2d 202 (C. C. A. 2).

There, upon a lawful arrest for a prohibition violation, the officers searched the premises and seized liquor and papers. The government argued that the arrest gave power to search for and seize both, arguing "that, since a person arrested may be searched, and all documents found upon him may be kept whatever their nature, and since the premises in which he is arrested may be searched for contraband as an incident to the arrest, the search so authorized must be as broad as the search of his person." 16 F. 2d at 202–203. The court, through Learned Hand, J., rejected this contention, saying (pp. 203, 204):

> While we agree that strict consistency might give to a search of the premises, incident to arrest, the same scope as to a search of the person, it seems to us that that result would admit exactly the evils against which the Fourth Amendment is directed, * * * the whole of a man's correspondence, his books of account, the record of his business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant.

Up to this point, then, except as to search of the person, the search incident to a lawful arrest was as broad as—though no more broad than—the search which could have been authorized by a search warrant.

B. *There may be an exception permitting search of the premises for evidentiary papers incident to*

a lawful arrest in cases where a crime is actually being committed in the presence of the arresting officers.

In 1927, the Court decided *Marron* v. *United States*, 275 U. S. 192, a case which produced considerable confusion until it was finally explained, distinguished, and limited. There, petitioner was lessee of the second floor of certain premises. A prohibition agent secured a warrant for their search and for the seizure of intoxicating liquors and articles for their manufacture. Four agents went to the place. It contained six or seven rooms and was being used for the sale and consumption of intoxicating liquor. Petitioner was not there but one Birdsall was in charge. The agents handed him the warrant and arrested him. They searched for and found large quantities of liquor, some of which was in a closet. While searching the closet, they noticed a ledger showing inventories of liquor, and receipts relating to the business. Beside the cash register they found a number of bills for gas, electric light, water, and telephone service furnished to the premises. They took the ledger and the bills. The Court held that although the seizure of the ledger and bills could not be justified under the warrant because they were not mentioned therein,[12] their seizure was proper as an incident to Birdsall's

[12] "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under

arrest. In this connection the Court said (275 U. S. at 198–199):

> * * * The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello* v. *United States, supra,* 30; *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States, supra,* 392. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose. Cf. *Sayers* v. *United States,* 2 F. (2d) 146; *Kirvin* v. *United States, supra; United States* v. *Kirschenblatt, supra.* The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if

a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." 275 U. S. at 196. See note 37 below, pp. 85–86.

not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

The *Marron* case was generally understood to remove the restrictions on searches of premises incident to arrests. The Second Circuit, which had insisted on those restrictions in the *Kirschenblatt* case, took the *Marron* case as overruling the limitations there expressed. *United States* v. *Gowen*, 40 F. 2d 593 (C. C. A. 2); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2). In view of the way in which this Court soon qualified the *Marron* decision, examination of the intervening Second Circuit rulings is illuminating.

In the *Poller* case, the defendant was arrested on reasonable cause to believe that he had committed a felony by trying to enter goods into the United States by means of false documents—watch movements manifested as chocolate sweets—in violation of 19 U. S. C. 491. Immediately upon his arrest, the agents searched the small shanty which was his place of business, and took therefrom various papers, some bearing on the importation of the shipment in question, and some relating to earlier transactions. The court was of opinion that its earlier decision in *United States* v. *Kirschenblatt*, 16 F. 2d 202, *supra*, had been overruled by the Supreme Court in the *Marron* case, that

consequently the arrest must be given a wider latitude of search than a search warrant itself, and that therefore the papers directly related to the particular offense were subject to seizure, although other papers, dealing with earlier shipments, must be returned. Judge Learned Hand, for the court, said (43 F. 2d at 913 and 914):

> When a man is arrested, the extent to which the premises under his direct control may be searched has proved a troublesome question. We tried in Kirschenblatt's Case to set limits upon it narrower than those recognized in the broad statements of the textbooks (Wharton, Criminal Procedure, § 97; Bishop, Criminal Procedure, § 211); and in some of the decided cases. This we did, following as best we could the doctrine as we understood it of the Supreme Court, and because it seemed unreasonable to suppose that an arrest should give wider latitude of search than a search warrant itself. We were not in accord with at least the language of a number of the cases in other circuits, which followed the usual form of statement that the search might include any evidence of the crime. * * * One of these, *Marron v. U. S.*, went to the Supreme Court and was affirmed (275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231), in which the seizure of a number of documents was sustained, which certainly went beyond anything which we had recognized as permissible. In *U. S. v. Gower* (C. C. A.) 40 F. (2d)

593, we had occasion to reconsider Kirschenblatt's Case, and there we held that it must be deemed overruled. Although *U. S.* v. *Gowen* is now before the Supreme Court on certiorari, we must adhere to it until otherwise advised, and indeed nothing has occurred to change our views as to the scope of the Supreme Court's decision.

* * * * *

In conclusion it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself, and in any case it is something to be assured that only that can be taken which has been directly used in perpetrating a crime. The remedy may not be very extensive, but it is something, and it is all that can be given, as we understand the present decisions. A man is certainly subject to some search of his premises upon his arrest; if it would have been better to allow nothing without warrant but a search of his person, it is too late to hold so now.

Even more significant is *United States* v. *Gowen*, 40 F. 2d 593, *supra*. There a warrant was issued for the arrest of Gowen and Bartels, officers of the Go-Bart Company, on a charge of conspiracy to sell intoxicating liquors. The next day agents went to the company's office, where they found Bartels. One of the agents told him that they had a warrant of arrest and a search warrant. They arrested him and searched his person. Gowen then arrived and was arrested. The agents compelled him to open a desk and safe, searched them and other parts of the office, and seized a large quantity of papers belonging to the defendants. They moved to have the papers restored to them and suppressed as evidence, and, on denial of the motions, appealed.

The Circuit Court of Appeals rejected appellants' attempt to distinguish the *Marron* case on the ground that there the arresting officers had evidence of crime committed in their presence (40 F. 2d at 595), and likewise their attempt to distinguish it on the ground that while there the documents seized were instrumentalities of the crime, here they were merely incriminating evidence. On the latter point the court said (40 F. 2d at 597, 598):

> The privilege of search incidental to a lawful arrest is not limited to search of the person; it extends to the premises where the arrest was made, and permits seizure of property there located and within the con-

trol of the accused, if it be contraband, as in *Carroll* v. *United States*, *supra*, or "things used to carry on the criminal enterprise," as in *Marron* v. *United States*, 275 U. S. 192. * * *.

> This case the appellants attempt to distinguish upon the ground that the papers and ledger there seized were instruments of the crime of maintaining a nuisance, while here the papers and documents are merely incriminatory evidence of the crime of conspiracy. We do not think the distinction can be substantiated. * * * We regard the *Marron* case as controlling and as sustaining the seizure in suit. In *United States* v. *Kirschenblatt*, *supra*, this court laid down a more limited doctrine, but we do not think it can stand after the *Marron* Decision.

On certiorari, *sub nom. Go-Bart Co.* v. *United States*, 282 U. S. 344, this Court reversed. It considered the case on the assumption that the facts of which the agents had knowledge prior to the arrests justified the arrests without a warrant; but it held that, notwithstanding the lawful arrests, the search of the premises and the seizure of the documents there found were unreasonable. The Court said (282 U. S. at 357–358):

> There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed.

> And there is no suggestion that Gowen or Bartels was committing crime when arrested. * * * By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. *It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306. (Italics added.)

Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who, in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

Actually, in the *Marron* case (No. 185, Oct. T. 1927), while the bills were found alongside the cash register in the kitchen (R. 107), the liquor seized was found in an icebox and a closet in the kitchen and in a closet in the front room (R. 97, 118), while the ledger was found in the closet in the front room (R. 98, 118, 126). The closet was locked when the agents entered (R. 121).

In *United States* v. *Lefkowitz*, 285 U. S. 452, a warrant was obtained for the arrest of Lefkowitz and Paris on a charge of conspiracy to sell, possess, transfer, deliver, and take orders for intoxicating liquors. A deputy marshal and four prohibition agents went to the office which consisted of a room divided by a partition. In one part were a stenographer's desk, used by Paris, a towel cabinet, and a waste basket; in the other part were another desk and basket. When the officers arrived, they found Lefkowitz and arrested him. The agents then searched both desks and the towel cabinets and took away books, papers, and other articles. The Court concluded that the search and seizure could not be justified as incident to respondent's arrest. In the course of its opinion the Court said (285 U. S. at 463–466):

> The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrests. And that must be decided on the basis of valid arrests under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, pa-

pers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

* * * * *

Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. Gouled v. *United States*, 255 U. S. 298, 310.

* * * * *

Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment

> of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Boyd* v. *United States*, 116 U. S. 616, *et seq.* *Weeks* v. *United States*, 232 U. S. 383, 395. *Gouled* v. *United States supra*, 306. *Carroll* v. *United States, supra.* [Italics added.]

The *Marron* case was again distinguished (285 U. S. at 465), this time on the ground that the barkeeper was maintaining a nuisance, that the offense involved an element of continuity, that no search was made for the ledgers and bills which were said to be "in plain view," and that the facts set out in the opinion "justify the inference that when the arrest was made the ledger and bills were in use to carry on the criminal enterprise."[14]

The foregoing survey covers the cases decided by this Court.[15]

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[14] As has been pointed out, note 13, *supra*, p. 33, the record in the *Marron* case shows that the ledger was in a locked closet in the front room at the time of seizure.

[15] In *Taylor* v. *United States*, 286 U. S. 1, it was held that breaking into a garage to seize whiskey therein was not rendered lawful by a subsequent arrest of the defendant. The Court noted that (286 U. S. at 6) "This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure evidence to support some future arrest."

We read the *Go-Bart* and *Lefkowitz* cases as forbidding only a general exploratory search for incriminatory papers as an incident of a lawful arrest, i. e., as prohibiting the seizure of documents which could not have been justified as the result of a search under a warrant, since no such warrant could have been justified by law, see *Gouled* v. *United States*, 255 U. S. 298—and not as forbidding a search of the premises for the fruits or instrumentalities of crime incident to the same lawful arrest.

The Second Circuit has so read the cases. Before the *Marron* case, the judges there held that a lawful arrest did not authorize a search of the premises for incriminatory papers. *United States* v. *Kirschenblatt*, 16 F. 2d 202, *supra*. After the *Marron* case, they held that it did. *United States* v. *Gowen*, 40 F. 2d 593; *United States* v. *Poller*, 43 F. 2d 911, both discussed *supra*, pp. 28–32. After the reversal in the *Gowen* case, *sub nom. Go-Bart Co.* v. *United States*, 282 U. S. 344, they reapplied the *Kirschenblatt* limitations. *Lefkowitz* v. *United States Attorney*, 52 F. 2d 52, affirmed *sub nom. United States* v. *Lefkowitz*, 285 U. S. 452.

It is significant also, we believe, that while the Second Circuit refused in the *Gowen-Go-Bart* situation to distinguish the *Marron* case on the ground that the former involved merely incriminating evidence while *Marron* dealt with instru-

mentalities of crime, see 40 F. 2d. at 597–598, *supra* pp. 31–32, this Court, which could naturally "distinguish" its own decisions more broadly, made just precisely that distinction in the *Lefkowitz* case—though just how ledgers in a locked closet and bills for supplies and services already furnished would be held to "justify the inference that when the arrest was made the ledger and bills were in use to carry on the criminal enterprise" (285 U. S. at 465) may well require more explanation than this Court gave it at the time.

Much was made in the *Go-Bart* and *Lefkowitz* cases of the distinction that in the *Marron* case a crime was in process of being committed at the time of the arrest, 282 U. S. at 358; 285 U. S. at 465. Here again, this is a distinction which the Second Circuit did not feel free to make while the *Marron* doctrine was in force. *United States* v. *Gowen*, 40 F. 2d at 595, *supra* pp. 31–32. It may be that a vestige of the *Marron* doctrine is still in force as to evidentiary searches and seizures of premises consequent upon an arrest for a crime actually being committed in the arresting officers' presence. Cf. *United States* v. *Davis*, 151 F. 2d 140, 143–144 (C. C. A. 2), affirmed, No. 404, Oct. T. 1945, decided June 10, 1946; *Dillon* v. *O'Brien*, 20 L. R. Ir. 300, 16 Cox C. C. 245. But we have no occasion to consider that problem here, since in the instant case it is not, nor could it be, contended that any crime was being committed in

the arresting officers' presence when petitioner was arrested.

We say only that nothing in the *Go-Bart* and *Lefkowitz* cases restricts the right of arresting officers, consequent upon and incident to a lawful arrest, to search the premises for the fruits and instrumentalities of crime—i. e., to make a search of the scope and for the purposes for which a search warrant could lawfully be issued.

We think it follows that the law applicable to the state of facts presented by the instant case may therefore be stated as follows:

As incident to a lawful arrest, the arresting officers—

(i) May search the person of an accused, and may use as evidence against him anything found on his person, including incriminating private papers;

(ii) May search the premises under his immediate control for instrumentalities of the crime for which he is arrested, as fully as if they had a valid search warrant for such instrumentalities;

(iii) May not conduct a general exploratory search of the premises looking for incriminatory papers, mere evidence of crime, any more than they could get a valid search warrant for such papers or evidence—except possibly when a crime is actually being committed in their presence.

We think it follows that the right to search the premises incident to an arrest is coextensive with

the right to search such premises under a search warrant. And, as we shall proceed to point out, the lower federal courts and the Congress have acted on that understanding.

C. *The Go-Bart and Lefkowitz cases have been uniformly understood to hold that a search of premises incident to a lawful arrest has as wide a scope as a search authorized by a search warrant, and is limited to the objects for which such a warrant could issue.*

The *Go-Bart* and *Lefkowitz* cases have been uniformly interpreted by the circuit courts of appeals as they were in the ruling below, namely, that these cases prohibit a general exploratory search for evidence, as distinguished from the instrumentalities of the crime, on the ground that purely evidential materials would not be subject to seizure even under a warrant. *United States v. Stappenbach*, 61 F. 2d 955, 957 (C. C. A. 2); *In re 14 East 17th Street*, 65 F. 2d 289, 292 (C. C. A. 2); *Landau v. United States Attorney*, 82 F. 2d 285, 287 (C. C. A. 2); *United States v. Lindenfeld*, 142 F. 2d 829, 832 (C. C. A. 2), certiorari denied, 323 U. S. 761; *Foley v. United States*, 64 F. 2d 1 (C. C. A. 5); *Parks v. United States*, 76 F. 2d 709, 710 (C. C. A. 5); *United States v. Thomson*, 113 F. 2d 643 (C. C. A. 7); *Papani v. United States*, 84 F. 2d 160, 163 (C. C. A. 9); *Takahashi v. United States*, 143 F. 2d 118, 124 (C. C. A. 9).

The circuit courts of appeal have continued to assume that, when an entry is lawfully made to effect an arrest, either under a warrant of arrest for a past crime, or on probable cause to believe that a felony has been committed, or because of a crime committed in the officer's presence, the arresting officer may, as a lawful incident of arrest, conduct a reasonable search of the premises under the control of the person arrested to discover and seize the instrumentalities of the crime. See cases collected in *United States* v. *Lindenfeld*, 142 F. 2d 829, 832 (C. C. A. 2), certiorari denied, 323 U. S. 761. See also *Shaw* v. *United States*, 155 F. 2d 628, 630 (C. C. A. 4), certiorari denied June 10, 1946 (No. 1285, Oct. T. 1945); *Morton* v. *United States*, 147 F. 2d 28, 30 (App. D. C.), certiorari denied, 324 U. S. 875. As Judge Clark said in a recent decision (*United States* v. *Lindenfeld*, *supra*), "Surely when there is a lawful arrest, the premises may be searched." A number of recent federal decisions upholding the right of search incident to an arrest (in addition to the ruling below) involve the factual situation of an arrest for a past crime. *Morton* v. *United States*, 147 F. 2d 28, 30 (App. D. C.), certiorari denied, 324 U. S. 875; *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. C. A. 2), certiorari denied, 323 U. S. 761; *United States* v. *Tot*, 131 F. 2d 261 (C. C. A. 3), reversed on other grounds, 319 U. S. 463; *United States* v. *Bell*, 48 F. Supp. 986 (S. D. Cal.).

State authorities are to the same effect. *Connell* v. *State*, 215 Ind. 318 (1939); *State* v. *Conner*, 59 Idaho 695 (1939); *State* v. *Long*, 336 Mo. 630, 640 (1935); *State* v. *Rasser*, 162 Ore. 293, 349 (1939); *Elg* v. *State*, 129 Tex. Cr. 29 (1935).

The question of the right to search incident to an arrest for a past crime, where the arrest is made pursuant to a warrant, was explicitly discussed in *United States* v. *Tot*, 131 F. 2d 261 (C. C. A. 3), reversed on other grounds, 319 U. S. 463. There, Tot had been arrested by federal officers at his home on a warrant charging theft of cigarettes from an interstate shipment. The officers asked Tot whether he had a gun, and he replied in the affirmative—that it was in the pocket of his coat which was hanging in a wardrobe closet in his bedroom. One of the officers went to the closet, found the coat, and seized the gun. Pretermitting the question of consent, the court held that there was a lawful search and seizure, saying (131 F. 2d at 264):

> Undoubtedly upon Tot's arrest under a valid warrant, as this was, his person could have been searched and the weapon taken from him. The same privilege to search the place where the arrest is made "in order to find and seize things connected with the crime as its fruits * * *, as well as weapons and other things to effect an escape from custody, is not to be doubted."

The opinion cites *Agnello* v. *United States*, 269 U. S. 20, 30, for the language in quotation marks, and in a footnote says with reference to that case (footnote 4, 131 F. 2d at 264):

> The Court states that this privilege exists where the arrest is made for a crime committed in the presence of the arresting officers. The latter requirement merely establishes the lawfulness of an arrest without a warrant, as in the *Agnello* case. When the arrest is made with a warrant, as here, the requirement is unnecessary, for then, the privilege of search and seizure, being incidental to a lawful arrest, is as extensive.

The doctrine that a lawful arrest confers a right to search the premises under the control of the person arrested, irrespective of the basis on which the arrest is made, has also received Congressional recognition. In 1935, three years after the *Lefkowitz* decision, when Congress passed legislation necessitated by the repeal of prohibition, it re-enacted the provision of the prohibition act making it a penal offense for an officer to search a dwelling house without a warrant,[*] and added the following provision (Act of August 27, 1935, c. 740, sec. 201, 49 Stat. 877, 18 U. S. C. 53a):

> *Provided*, That nothing herein contained shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting

[*] See *Carroll* v. *United States*, 267 U. S. 132, 144–147.

> to arrest any person committing or attempting to commit an offense in the presence of such officer, agent, or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony.

The committee reports (74th Cong., 1st sess., S. Rep. 1330, p. 5; H. Rep. 1601, p. 5) explain the addition as follows:

> This addition is merely a restatement of the common law on the subject, and is desirable inasmuch as it avoids the possible construction that the broad penalty feature of the section was intended to exclude the operation of the common-law rule in this regard.

D. *The right to search premises under the accused's control for instrumentalities of crime as an incident to his lawful arrest is of ancient origin, and its recognition by the courts represents not an encroachment on constitutional protections but rather a reaffirmation of their original boundaries.*

At the last Term, however, in the course of his dissenting opinion in *Davis* v. *United States,* No. 404, decided June 10, 1946, Mr. Justice Frankfurter suggested that the *Go-Bart* and *Lefkowitz* cases were designed to limit the concept that a search of premises incident to an arrest was reasonable, distinguishing the situation where the fruits or instrumentalities of the crime were in

open view and thus subject to seizure without search. He said (slip opinion, pp. 13–15):[1]

> A casual and uncritical application of this right to search the person of the prisoner has led some decisions in the lower federal courts to an unwarranted expansion of this narrow exception, with resulting inroads upon the overriding principle of the prohibition of the Fourth Amendment. Slight extensions from case to case gradually attain a considerable momentum from "judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality, but which, in reality, strike at the substance of the constitutional right." *Byars v. United States*, 273 U. S. 28, 33–34. In cases dealing with the search of the person it is natural to speak of the right to search and seize things "in his possession" without strict regard to the ambiguous scope of a man's "possession." From that, opinions slide readily to including the right to search and seize things "within the immediate control" of the arrested person, language appropriate enough when applied to goods which the arrested person was transporting at the time. Taken out of their original context, these phrases are used until they are made to include the entire premises in which the arrest takes place. Another factor enters. This language is

[1] The citations in the footnotes of the opinion have been omitted.

sometimes used in cases involving the seizure of items properly subject to seizure because in open view at the time of arrest. But this last confusion is due to a failure to distinguish between the appropriate scope of a search on arrest and the very different problem as to the right of seizure where no search is in question.

It is important to keep clear the distinction between prohibited searches on the one hand and improper seizures on the other. See Mr. Justice Miller, in *Boyd* v. *United States*, 116 U. S. 616, 638, 641. Thus, it is unconstitutional to seize a person's private papers, though the search in which they were recovered was perfectly proper. *E. g., Gouled* v. *United States*, 255 U. S. 298. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure, *e. g., Amos* v. *United States*, 255 U. S. 313; *Byars* v. *United States*, 273 U. S. 28; *Taylor* v. *United States*, 286 U. S. 1. And a search may be improper because of the object it seeks to uncover, *e. g., Weeks* v. *United States*, 232 U. S. 383, 393–94, or because its scope extends beyond the constitutional bounds, *e. g., Agnello* v. *United States*, 269 U. S. 20.

The course of decisions here has observed these important distinctions. The Court has not been indulgent towards inroads upon the Amendment. Only rarely have its dicta appeared to give undue scope to the right of search on arrest, and

> *Marron* v. *United States, supra*, is the only decision in which the dicta were reflected in the result. That case has been a source of confusion to the lower courts. Thus, the Circuit Court of Appeals for the Second Circuit felt that the *Marron* case required it to give a more restricted view to the prohibitions of the Fourth Amendment than that court had expounded in *United States* v. *Kirschenblatt, supra*, see *Go-Bart* v. *United States, sub nom., United States* v. *Gowen*, 40 F. 2d 593, only to find itself reversed here, *Go-Bart* v. *United States, supra*, partly on the authority of the *Kirschenblatt* decision which, after the *Marron* case it thought it must disown. The uncritical application of the right of search on arrest in the *Marron* case has surely been displaced by *Go-Bart Co.* v. *United States, supra*, and even more drastically by *United States* v. *Lefkowitz, supra*, unless one is to infer that an earlier case qualifies later decisions although these later decisions have explicitly confined the earlier decision.

As we have already pointed out, neither the Congress nor the circuit courts of appeal have so read the *Go-Bart* and *Lefkowitz* cases. But we turn to an independent examination of the suggestion made.

We think that the *Go-Bart* and *Lefkowitz* cases clearly dispose of the contention, which had earlier been rejected in *United States* v. *Kirschenblatt*, 16

F. 2d 202, *supra* pp. 24–25, that because the defendant's person may be searched consequent upon his arrest, and incriminating papers taken from him, it follows that the premises under his control may likewise be searched for similar documents. Cases holding the contrary we concede to have been wrongly decided under the *Go-Bart* and *Lefkowitz* opinions, which clearly condemn exploratory searches of the premises for papers which could not have been taken under authority of a search warrant.[17] Possibly, as we have suggested above, p. 38, there may still be room for exploratory searches where the crime is actually being committed in the presence of the arresting officers;[18] in the instant case we do not reach that problem. But, reading the Fourth Amendment, as we must, in the light of practices current at the time of its adoption,[19] we think it is clear that a search of premises incident to an arrest represented an existing and widespread practice which was entirely unaffected either by Lord Camden's ruling

[17] E. g., *Browne* v. *United States*, 290 Fed. 870 (C. C. A. 6); *Sagers* v. *United States*, 2 F. 2d 146 (C. C. A. 9); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2).

[18] E. g., *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3).

[19] See *Boyd* v. *United States*, 116 U. S. 616, 624–625; and see *Carroll* v. *United States*, 267 U. S. 132, 149: "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

in *Entick* v. *Carrington*, 19 How. St. Tr. 1030 (1765) or by the limitations of American Constitutions, state and federal. Time has not permitted a complete examination of the actual records of cases reported in *Howell's State Trials* and in the *American State Trials*, but the sampling technique has revealed a sufficient number of instances to indicate that the practice in question was widespread.

Thus, at the *Trial of Patrick Hart* in 1796 (26 How. St. Tr. 388, 396), thirty years after the decision in *Entick* v. *Carrington*, an officer testified as follows:

> Received a warrant from alderman James, to apprehend the prisoner and several others, and accordingly went to the House where the prisoner lived—broke upon the street door with a sledge, went upstairs, found the prisoner and another boy in bed—took a paper, or parchment out of the prisoner's breeches pocket—knew they were his breeches, from his having told the witness so—they were not the breeches which the prisoner put on—found some parchment and papers in a box in the room—a broken blunderbuss, and about 20 rounds of ball cartridge—witness did not inquire whose the box was—nor did he know.

At the *Trial of Henry and John Sheares*, 27 How. St. Tr. 255, 321 (1798), an officer identified

papers found in a small writing box upon the table in the home of one of the defendants.

Some years later, in 1820, at the *Trial of Arthur Thistlewood*, 33 How. St. Tr. 682, 811–812, an officer was first asked whether he had found any persons who were afterwards taken into custody and subsequently was asked whether he had searched the room and what he had found.

At the *Trial of James Ings*, 33 How. St. Tr. 957, 1047 (1820), an officer testified to the arrest of two defendants and to a search of their entire lodgings.

Similar practices with respect to the search of premises [21] consequent upon an arrest are shown in the records of the earliest reported American cases.

In Massachusetts, in 1817, at the *Trial of Levi and Laban Kenniston* for robbery before the Supreme Judicial Court, 14 Am. St. Tr. 237, 244, the person allegedly robbed testified that he, together with officers, entered the home of the defendants, arrested them, and searched the entire premises for the stolen property.

The same practice was current in New York. At the *Trial of Richard P. Robinson*, 12 Am. St. Tr. 426, 446, before the Court of Oyer and Terminer in 1836, it appeared that the room of

[21] For an early case showing that the person arrested was regularly searched, see *Trial of Bathsheba Spooner et al.*, 2 Am. St. Tr. 175, 181 (Mass. Super. Ct. of Judicature, 1778).

the defendant was searched at the time of his arrest. Similarly, at the *Trial of John C. Colt* for murder in 1842, before the same tribunal, an officer testified as follows (4 Am. St. Tr. 455, 469):

> Am an officer. Arrested Mr. Colt. Found the hatchet under a lot of papers and a trunk placed over them, found a pail there, and the other things already described.

Search of the premises incident to an arrest was likewise the practice in North Carolina. At the *Trial of the Rev. George W. Caraway* in the Superior Court of Beaufort County in 1853, a deputy sheriff testified as follows (6 Am. St. Tr. 514, 533):

> * * * Had process in my hands against the prisoner after the body of Lassiter had been found, but could not find him. I looked for him on Monday and Tuesday, 22nd and 23rd November. Found a long double-barreled gun in Caraway's house, in his bed room. I drew the loads and examined them. Both barrels were loaded, one of them with buck shot.

It is to be noted that North Carolina had no statute authorizing the issuance of search warrants at that date. An act passed in 1868 (N. C. Laws of 1868–69, c. 178, sub-ch. 3, § 38), authorizing the issuance of warrants, was limited to warrants for stolen property, counterfeit notes, and instruments for producing counterfeit notes.

Again returning to New York, the record of the *Trial of Emma Cunningham* before the Court of Oyer and Terminer in 1857, 5 Am. St. Tr. 90, 123, contains the testimony of a policeman that he was present in the defendant's room "when it was searched by order of the coroner." We find nothing in the laws of New York at that period authorizing the coroner to direct a search. See 3 N. Y. Rev. Stat. (5th ed. 1859) p. 1036. Indeed, the right to issue warrants was limited to warrants to search for stolen property. 3 N. Y. Rev. Stat. (5th ed. 1859), p. 1040.

The reported decisions of American appellate courts prior to *Weeks* v. *United States* do not, for the most part, discuss the matter. Many of the early decisions involve only the right to search the person. *Ex parte Harn*, 92 Ala. 102 (1891); *Woolfolk* v. *State*, 81 Ga. 551, 562 (1888); *Reifsnyder* v. *Lee*, 44 Iowa 101 (1876); *Commercial Exchange Bank* v. *McLeod*, 65 Iowa 665 (1885); *Thatcher* v. *Weeks*, 79 Me. 547 (1887); *North* v. *People*, 139 Ill. 81, 107 (1891); *Stuart* v. *Harris*, 69 Ill. App. 668 (1897); *Holker* v. *Hennessey*, 141 Mo. 527 (1897); *Closson* v. *Morrison*, 47 N. H. 482 (1867); *Fogg* v. *Worster*, 49 N. H. 503 (1870); *O'Connor* v. *Bucklin*, 59 N. H. 589 (1879); *Spalding* v. *Preston*, 21 Vt. 9 (1848). It does not follow, however, that the only right of search incident to an arrest that was recognized in the period before 1900 was the right to search the person; for examination of these cases shows that almost

all involve an attempt to obtain money in the hands of the arresting officer, usually by way of execution by a third party. Money would be more likely to be taken in the search of a person rather than the search of the premises. The absence of earlier appellate opinions dealing with the right to search premises, therefore, does not warrant an inference that such right was unknown in our earlier history, particularly in view of the consistent practice reflected by the records of early criminal trials.

The other group of early appellate decisions in America involves the seizure without a warrant at the time of arrest of obvious fruits or instrumentalities of the crime, such as gambling devices or stolen property. *Newman* v. *People*, 23 Colo. 300, 310–311 (1896); *Kneeland* v. *Connally*, 70 Ga. 424 (1883); *Rusher* v. *State*, 94 Ga. 363 (1894); *State* v. *Robbins*, 124 Ind. 308 (1890); *Banks* v. *Farwell*, 21 Pick. 156 (Mass. 1838); *Houghton* v. *Bachman*, 47 Barb. 388 (N. Y. 1866). Some of these cases involved a search of premises to the extent that the accused, upon arrest, was questioned as to the location of stolen property, and after he had made known its location, the officers searched and seized the property. *Rusher* v. *State*, *Banks* v. *Farwell*, and *Houghton* v. *Bachman*, *supra*. In *Banks* v. *Farwell*, a Massachusetts case, the accused was arrested outside his shop, and when he stated that the stolen property was in the shop, the officer broke into the

premises without permission and seized the stolen chattel. The court upheld the officer's action under a statute passed in 1804 making it the duty of the "officer who shall be lawfully employed in apprehending and arresting any person accused of the crime of larceny, to seize and secure the money, goods or other articles alleged to be stolen which shall be found in the possession of such accused person." This decision, as well as that in *Houghton* v. *Bachman, supra*, does, however, contain language which seems to indicate that, while the officer would have a right to seize property where he knew its location, he would not have the right to search for concealed property.

The disparity between the virtually axiomatic acceptance of a right to search recognized in the *Weeks* case, and the absence of earlier appellate authorities in this country recognizing such a right additionally supports the view that the *Weeks* decision was giving recognition, not to reported decisions, but to an actual practice which was so much a part of the legal thinking of the time that it had never been the subject of controversy. There are indications, even apart from the earlier records of trial, that such was the case. In *Smith* v. *Jerome*, a decision in the Supreme Court of New York, 47 Misc. 22 (1905), the following broad language upholds the right of search incident to an arrest for a past crime (pp. 23–24):

> The police have the power and it is also their duty to search the person of one law-

> fully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested. We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial. * * *

In *Getchell* v. *Page*, 103 Me. 387 (1908), similarly the court said (pp. 390–391):

> It is well settled that an officer making an arrest upon a criminal charge may also take into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence upon the trial. The officer not only has the lawful power to do so, but he would be blameworthy if he failed to do so. The maintenance of public order and the protection of society by efficient prosecution of criminals require it. * * *

And in *United States* v. *Mills*, 185 Fed. 318 (C. C. S. D. N. Y. 1911), writ of error dismissed, 220 U. S. 549, Circuit Judge Lacombe remarked (185 Fed. at 319):

> From time immemorial an officer making a lawful arrest on a criminal charge has taken into his possession the instruments of the crime and such other articles as may reasonably be of use as evidence on the trial. A blood-stained knife or garment,

> a half-emptied phial of poison, a mask or disguise, counterfeit coins, plates for printing counterfeit notes, gambling devices, stolen property, and many other articles are thus seized every day on the person or the premises of the alleged criminal, and no one disputes the propriety of such seizure.

Similar expressions appear in the leading Irish case of *Dillon* v. *O'Brien*, 20 L. R. Ir. 300, 16 Cox C. C. 245, decided in 1887, which we deem appropriate to discuss at some length, not only because it is the only authority which considers with any particularity the rationale of the right to search premises incident to a lawful arrest, but also because it was cited and relied on by this Court when that right was recognized here in the *Weeks* and *Carroll cases*. 232 U. S. at 392; 267 U. S. at 158.

In *Dillon* v. *O'Brien*, the plaintiff, a Member of Parliament, had been arrested under a lawful warrant charging him with conspiracy, and the defendants, peace officers, seized books, papers, a telegram, gold and silver coins, and bank notes from the room and house in which the plaintiff was at the time of his arrest. The charge against the plaintiff was in due course dismissed for want of prosecution, after which he sued for, *inter alia*, an order for the return of the goods seized and damages for their detention. Defendants answered, alleging that the plaintiff was guilty of the offense charged and was arrested while actually committing it, and that the property seized

had been in use in the commission of the conspiracy. The case came before the Exchequer Division of the High Court of Justice in Ireland on plaintiff's demurrer to the answer.

Chief Baron Palles, for the court, first considered the contention that there was no right to seize evidence even in the case of a felony. As to this he said (20 L. R. Ir. at 314): [22]

> * * * * If, then, the right here claimed does not exist, even in treason and felony, it would follow that upon the arrest of a murderer caught in the act, and on the moment lawfully arrested, whilst the weapon with which the crime had been committed was in his hand, it would be illegal for the constable to detain that weapon for the purposes of evidence; so also would it be illegal for the officers of the law to take possession of poisons found in the possession of one who had caused death by poison; and, even in treason, letters from co-traitors evidencing the common treasonable design, found in the possession of a traitor, would be safe from capture upon his arrest, although from the earliest times it has been the settled and unvarying practice to seize such proofs of guilt and give them in evidence at the trial.

After examining the authorities, the Lord Chief Baron held that the right did exist in cases of fel-

[22] We have used the report in 20 L. R. Ir., which is more complete than the one in 16 Cox C. C.

ony; that the only question was whether if extended to cases of misdemeanor; and that for this purpose it was necessary to examine the reason of the rule in felony, which the learned judge found to be the interest of the State in bringing guilty persons to justice. Said Palles, C. B. (20 L. R. Ir. at 316–318):

> I therefore treat it as clear and beyond doubt that, at least in cases of treason and felony, constables (and probably also private persons), are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime; and I take the only real question upon this defence as being, whether this right extends to cases of misdemeanour.
>
> * * * * * *
>
> For this purpose I must first ascertain the reason of the rule as applicable to felony. The characteristic (by which felony is distinguished from misdemeanor) is that at common law the goods of the felon were forfeited upon conviction. The only right, however, to these goods which the books mention as being in the Crown before conviction, by reason of the possible future conviction, is that of taking (and detaining them for a reasonable time) *for the purpose of making an inventory.* Such a right has nothing in common with that of taking for the purpose of evidence. Forfeiture in felony, therefore, cannot be the origin of the

right. To what then, is it to be referred? Its purpose and object, viz. to produce in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. On the existence of this interest in the State, many of the most important principles of our jurisprudence depend. It is it which renders illegal an agreement to compromise a prosecution, whether for felony or (with one possible exception: *Keir* v. *Leeman*, 9 Q. B. 371) for misdemeanour. It is this, too, which prevents even a malicious prosecution against an innocent person constituting a cause of action, if there be reasonable and probable cause for its institution. The paramount nature of this interest is well illustrated by the power which, for the purpose of enforcing it, the law gives to the officer in whose custody a person charged with a crime lawfully is. There is no doubt that he may kill his prisoner in case of resistance, if he cannot otherwise secure his custody; and this as well when the charge is misdemeanour as felony. But the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial. His custody is of no value if the

law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form. But if there be a right to product on or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture.

If material evidences of crime are in the possession of a third party, production can be enforced by the Crown, by *subpœna duces tecum*. But no such writ can be effective in the case of the person charged.

It appears to me to be clear that this must be the origin of the right in felony; and that, being derived from the common law, it ought, *prima facie* at least, to be deemed to exist in all cases in which that interest of the State exists, and cannot (at least without express authority) be so confined as to be inapplicable in cases of custodies of such value in the eyes of the law as to justify, for their preservation, the taking of life.

The case of *Entick* v. *Carrington* was distinguished as involving a warrant issued on mere suspicion, and not, as in the instant case, upon an allegation of guilt and a lawful apprehension. Palles, C. B., said on this point (20 L. R. Ir. at 318–319):

This brings me to the only case relied on by the plaintiff: *Entick* v. *Carrington*, 19 How St. Tr. 1029.[1] The question there was as to the legality of a warrant, not only to

seize and apprehend the plaintiff and bring him before a Secretary of State, but also to seize his books and papers. In that case there was no allegation of the plaintiff's guilt, nor that there was reasonable and probable cause for believing him to be guilty, nor that a crime had, in fact, been committed by anyone, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or anyone alse. The nature of the question there is shown by the statement of Lord Camden, *ibid.* 1063, 1064, that "If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." Lord Camden takes pains to show that the word "papers" in the warrant could not, in point of law, be restrained to libellous papers only; and he adds:—"All the papers and books, without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer." It was of course, decided that that warrant was illegal; but the case, as a decision, is not in point here. The right here claimed is not to take all the

> plaintiff's papers, but those only which are evidence of his guilt; and the claim is based, not as in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, upon a warrant issued upon mere suspicion, but upon an allegation of actual guilt, and a lawful apprehension of the guilty person. If (by the law, as then understood) the right to seize evidences of guilt in the possession of the person charged was confined to cases of treason and felony, the judgment would have been rested on that simple ground; the care which was taken to show that the warrant embraced all papers would have been thrown away, and the entire of the elaborate judgment of Lord Camden would have been unnecessary. For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers.

While the offense for which the plaintiff in *Dillon* v. *O'Brien* was arrested was being committed in the presence of the arresting officers, the modern English law apparently does not rest the right of search incident to an arrest on that circumstance. Thus, in *Elias* v. *Pasmore*, [1934] 2 K. B. 164, damages were sought for the detention of documents seized on the premises in which the plaintiffs were arrested by the defendant police officers. No crime was being committed in the officers' presence. The court awarded

damages only in respect of the detention of documents which did not constitute evidence at the trials of the persons arrested, observing ([1934] 2 K. B. at 173)

> that the interests of the State must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by anyone, and that so far as the documents in this case fall into this category, the seizure of them is excused.[23]

All of the expressions quoted above, pp. 54–56, 57, together with the consistent practices reflected in the records of both English and American trials subsequent to *Entick* v. *Carrington*, indicate that a search of premises at the time of arrest was always considered outside the law relating to search warrants as such, and that while search warrants were deemed necessary where the search was used to establish probable cause to effect an arrest or to recover property without an arrest,[24] such considerations had no application

[23] Counsel for the plaintiffs, Sir Stafford Cripps, K. C., among them, cited *Entick* v. *Carrington* and *United States* v. *Lefkowitz*. This underscores the divergence between the modern English and American law with respect to exploratory searches of premises incident to a lawful arrest therein, as does the circumstance that *Dillon* v. *O'Brien* was discussed and relied upon in the Government's brief in the *Lefkowitz* case. U. S. Br. 21–24, No. 466, Oct. T. 1931.

[24] See the discussion in 2 Hale, *Pleas of the Crown* *114, regarding search warrants for stolen property: 74. But be-

where the offender had been identified and actually apprehended. This exception seems as well founded as the practice of searching the person upon arrest, which, whatever its origin (see Frankfurter, J., dissenting, in *Davis* v. *United States, supra,* pp. 12–13 of slip opinion), is certainly nowhere questioned at this time. It is to be noted that neither Hale nor Hawkins discusses search of the person any more than they mention search of the premises incident to an arrest, although the search of the person is admittedly ancient, extending well beyond the time of legal memory, and never questioned.[25]

We conclude, therefore, that the search of the premises occupied by an arrested person for contraband or for the fruits and instrumentalities of crime, as an incident to a lawful arrest, represents a historically well recognized right of law enforcement officers. It does not involve any erosion by imperceptible stages of constitutional protections; to the contrary, it marks a boundary between the rights of the individual and the rights

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cause the having of stolen goods in his custody is *prima facie* an evidence of a felony and a good cause of suspicion, it is a lawful clause in the warrant to attach the party, in whose custody they are found * * *."

[25] See 2 Hale, *Pleas of the Crown* 114–119, 2 Hawkins, *Pleas of the Crown* (6th ed. 1787) 137–139, dealing with the manner of executing warrants of arrest. The search of the person of the arrested individual was common practice. See *Trial of Francis De la Motte*, 21 How. St. Tr. 687, 738 (1781); *Trial of Thomas Kennedy*, 26 How. St. Tr. 354, 370 (1796). And see note 21, *supra*, p. 50.

of the community which has been clearly and recognizably indented for many years.[26]

While the precise historical origin of the right of search here in question may be obscure, the ready acceptance which the courts and the Congress have accorded the principle that a lawful arrest confers upon the arresting officers the right to search the premises under the control of the person arrested indicates that such a doctrine has not shocked the sensibilities of the bar, of the bench, or of the legislature. Such a right has not appeared to them to be an unreasonable one, violative of the spirit of the Fourth Amendment.

It is to be noted that a search of the premises under the control of the person arrested at the time of his arrest involves none of the evils of a general warrant condemned in *Entick* v. *Carrington* and prohibited by the Fourth Amendment. A search incident to an arrest is limited to one particular place, to one particular time, and to particular objects, i. e., the instrumentalities of the crime for which the person is arrested. The existence of probable cause for the search must

[26] The records of trials discussed above, pp. 49–52, contain indications which support the historical correctness of the present English view (see *Elias* v. *Pasmore*, [1934] 2 K. B. 164, *supra*) that the right to search premises incidental to a lawful arrest is broad enough to include a general exploratory search for any incriminating evidence. But, in view of the *Go-Bart* and *Lefkowitz* cases, we do not suggest that such broad searches would be legal in this country, except possibly where the crime is actually being committed in the presence of the arresting officers. See pp. 38–39, *supra*.

be established either by a warrant of arrest or by facts which are sufficient to withstand judicial scrutiny if the arrest is made without a warrant. There is thus no possibility that a search incident to an arrest can be extended to cover a general search for evidence on the basis of mere suspicion—the type of search which the Fourth Amendment intended to prohibit.

The practical justification for a search incident to an arrest is readily apparent as applied to situations where a crime is being committed in the presence of the arresting officer. For example, where an officer comes upon a person selling narcotics, it is certainly reasonable for him to search for additional narcotics that may be hidden in a cabinet or bureau drawer in the same or an adjoining room. Such practical justification does not necessarily disappear because the offense has been completed. Where the arrest is made shortly after the crime has been committed at the very place of its commission, as in *United States* v. *Lindenfeld*, 142 F. 2d 829, certiorari denied, 322 U. S. 761, where the arrest was made immediately after a government informer had received a prescription for narcotics from the defendant, it is not unreasonable to allow the officer to search the place where the offense has been committed for the instrumentalities of the crime. So, too, an officer who pursues a murderer and finds him in his home would, we submit, be amply justified in searching

his apartment for the murder weapon if it was not found upon his person.

Where, as in this case, the arrest is made some time after the offense has been completed, at a place other than that where the crime was committed, the right to search premises incident to an arrest for a crime long since past becomes of practical importance when the fruits or instrumentalities of the crime, while generally known, are not so identified as to be described with the specificity required of search warrants. But this circumstance does not render the search unreasonable. It must be remembered that the entry, the breach of the castle wall of the home if the arrest is made at home, is lawfully made,[27] either on a judicial finding or on facts which can withstand judicial scrutiny showing that a crime has been committed and that there is reasonable cause to believe that the person arrested is the offender. The nature of the objects sought must have a reasonable relation to the crime charged. It would, we think, be wholly unreasonable to hold that under such circumstances the home of a suspected murderer may not be searched for the lethal weapon or the bloody clothes of his victim simply because the arresting officers may not know their exact nature. Cf. *Morton* v. *United States*, 147 F. 2d

[27] Distinguish the situation where the police have no right to enter the home. *Nuslein* v. *District of Columbia*, 73 App. D. C. 85, 115 F. 2d 690.

28, 30 (App. D. C.), certiorari denied, 324 U. S. 875. We submit that it would be similarly unreasonable to hold that where, as here, police have already shown to a judicial officer that there is reasonable cause to believe that a defendant has committed mail fraud by mailing forged checks, and the officers have made a lawful entry into a defendant's house or office for the purpose of arresting him for that offense, they may not examine his bureau drawers as well as his trouser pockets to find the forged checks. Certainly there is nothing in the Fourth Amendment, nor in its origins or in the line of its growth (cf. *Gompers* v. *United States*, 233 U. S. 604, 610) which affords more protection to the furniture of a defendant than to his person.

Having regard to the consistent practice which for well over a century has sanctioned reasonable searches of a defendant's premises for instrumentalities of crime incident to his lawful arrest for that crime, both in England where *Entick* v. *Carrington* is unquestioned authority, and in this country where the effect of that great judicial landmark is preserved by the Fourth Amendment and by analogous provisions in the constitutions of the several states, having regard also to the many decisions which uphold that practice, in this Court and elsewhere, we submit that such searches are, as they have been recognized to be, consistent with the Constitution.

II

THE SEARCH WAS NOT A GENERAL EXPLORATORY SEARCH FOR EVIDENCE OF CRIME

Petitioner contends (Pet. 4, 14–15, 15–21, 26–28) that the search in the instant case was an "unlimited, ransacking search of [his] home as an incident of his lawful arrest for the purpose of discovering and seizing evidence of his guilt." The court below found this assertion to be without support in the record (R. 149). Recognizing that "general exploratory searches for the purpose of uncovering evidence of crime, or for obtaining information, either with or without a search warrant [are] unreasonable" (R. 147), the court rejected petitioner's contention, saying (R. 149–150):

> * * * The officers did not enter to explore—to see what they could find. They entered to execute a valid warrant of arrest. The incidental and contemporaneous search was thorough—it was as thorough as its nature required, but the reasonableness of a search is not necessarily to be judged by its thoroughness, so long as it has a reasonable relationship to its object. [Petitioner] was arrested for offenses involving the forgery of a $25,000 check drawn on the Mudge Oil Company and signed by designated officers, and the testimony in this case is to the effect that the officers were looking for two $10,000 cancelled checks which had been stolen from the offices of the Mudge Oil Company, and which the officers had good reason to

believe had been used as a part of the means for forging the $25,000 check.' The avowed purpose of the search was for the means by which the crime was committed and it extended no further and was no more extensive than necessary to uncover the articles sought. It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot, and it is not unlikely or unreasonable to assume that they would be found encased in an envelope where the draft cards and certificates were in fact discovered.

To be sure, the authority to search for the fruits or the means of the offense as an incident to the lawful arrest, like all prerogatives based on reason, is susceptible to oppressive abuse. The authority must be confined to narrow limits and utmost good faith exacted. Courts must exercise care lest we unwittingly sanction an evidential exploration under the guise of a declared legitimate purpose. The restraint can best be imposed by an inquiry into the bona fides of the declared purposes of the search and the trial court is the first and best judge of whether the challenged search was reasonably incident to its permissible purposes.

When the search was challenged in this case, the trial court conducted an extensive inquiry concerning its purposes and scope, and based upon all of the evidence concluded that the search and seizure was not unreasonable. While it is also our duty to

> exercise circumspection for the constitutional rights of the one accused of crime, we must accord to the trial court the primary responsibility of balancing orderly and efficient enforcement of the criminal laws against the constitutional rights of those charged with crime. When judged by these standards, we are unable to say that the search for the fruits and means of the crime charged as an incident to the lawful arrest therefor was unreasonable under the attendant circumstances.

Petitioner assails (Pet. 17–21, 26–28) the correctness of the conclusion reached by the circuit court of appeals that the "officers did not enter to explore—to see what they could find. They entered to execute a valid warrant of arrest." He states that if the real purpose of the officers in entering his home was to arrest him, "they had completed their mission" when they arrested him, so that, presumably, the search had no relation to the entry; that he was never indicted for the offenses which formed the basis of the arrest; and that the officers after embarking on the search procured a warrant to search his automobile on an assertedly inadequate affidavit. All of this is referred to apparently for the purpose of supporting the contention that the search was a general exploratory search for evidence. General exploratory searches made to find evidence of an accused's guilt of crime are unreasonable under the ruling in *United States* v. *Lefkowitz*, 285 U. S. 452, 465.

Nor may an arrest be "used as a pretext to search for evidence." *United States* v. *Lefkowitz, supra,* 285 U. S. at 467. The testimony of the agents as to the objects of the search was that they were looking for the tools which petitioner had used in his "confidence game," specifically for checks, writing materials, and burglar tools (pp. 6–7, *supra*). We submit that these were proper objects of a search as the instrumentalities or means of committing the offenses involved.

That the two $10,000 canceled checks and the burglar's tools were properly sought for is not, we submit, open to serious question. Petitioner was alleged to have sent through the mails on March 7, 1944, a forged $25,000 check purportedly to have been made by the Mudge Oil Company (*supra,* p. 5). There was evidence tending to show that on the previous evening petitioner had opened the locked door of the company's office and abstracted from it two of the company's canceled checks (p. 6, *supra*). It is clear that petitioner could have used these in order to forge the $25,000 check. Plainly, the agents were entitled to look for the "tools" by which petitioner might have opened the entrance to the company's office. In respect of the pens and writing materials,[25] it is, we believe, not unreasonable to regard

[25] The agents testified that they seized seven or eight pens (p. 7, *supra*). Petitioner in his motion to suppress alleged that the agents also seized a quantity of blank stationery and bills (pp. 7–8, *supra*). It is true that the Government

them as "a part of the * * * equipment actually used to commit the offense." *Marron* v. *United States*, 275 U. S. 192, 199. Certainly the pens and writing materials here were more closely related to the commission of the forgery in connection with which petitioner here was arrested than were the ledger and the bills for past utility services to the maintenance of a speakeasy in the *Marron* case, the crime there involved.

The fact that the officers here proceeded to make a search of the apartment after they had already effected petitioner's arrest is far from proving that their object in entering the apartment was a search rather than to execute the warrants. The sequence of events establishes the contrary. And since the officers were empowered to search as incident to the lawful arrest, the fact that they intended to do what the law authorized obviously cannot make their entry unlawful.

Nor did the entry and search become unlawful because, during the course of the search the officers obtained a warrant to search petitioner's automobile and office upon an affidavit which might have been inadequate for that purpose or as the basis for a warrant to search petitioner's apartment because the ground of the agent's belief was not set forth in sufficient detail. Assum-

did not deny these allegations. But petitioner's affidavit was not subjected to cross-examination, while the agents were.

ing here that that affidavit did not state the grounds of their belief in sufficient detail (cf. *Byars* v. *United States,* 273 U. S. 28; *Grau* v. *United States,* 287 U. S. 124), it does not follow that the agents did not have probable cause for belief that petitioner had committed the offense and had the offending articles in his possession. The agents had, in obtaining the warrant of arrest, already established to the satisfaction of a judicial officer that they had probable cause to believe he had committed the offense.

Indeed, the circumstance that the officers sought a warrant for the search of petitioner's automobile and office reflects their good faith. Under the decisions set out and discussed at length above, pp. 20–25, they needed no warrant to search the apartment for the instrumentalities of petitioner's crime other than the warrant for his arrest. But, under the ruling in *Agnello* v. *United States,* 269 U. S. 20, discussed *supra,* pp. 23–24, they could not search for instrumentalities of crime beyond the premises on which the arrest took place. Had they disregarded the command of the *Agnello* case and searched petitioner's office and automobile without undertaking to procure a warrant, they might well have been culpable; instead, they took steps to remain within the limits of the decided cases.

It does not appear from the record whether petitioner was or was not tried for the offense for which he was arrested. But even if the record

affirmatively established that he was not so tried, that fact would not stamp the search as one for evidence of crime. Obviously, a search incident to an arrest, having as its object the instrumentalities of the crime, is not transformed into a prohibited search for evidence of crime by virtue of the fact that a prosecution for the offense for which the arrest is made does not ensue. Cf. *Dillon* v. *O'Brien, supra.* Witnesses may have died or disappeared. It may well be that an accused is able to secrete successfully in his home stolen property which is the object of a valid search. The failure to find the property may make a prosecution unavailing. It is certainly not to be supposed that the validity of the search in such a case is to be measured by its success or otherwise in uncovering what was sought.

To support his contention that the search was a prohibited exploratory search for evidence of his guilt of crime, petitioner refers to it as having been an "unlimited ransacking" of his home (Pet. 15), and as a search "in every nook and corner." That the search was thorough may be conceded; that it was an "unlimited ransacking" of the apartment is not supported by the record. Under the circumstances, the search was necessarily thorough, and, as the court below pointed out, "the reasonableness of a search is not necessarily to be judged by its thoroughness. * * * The avowed purpose of the search was for the means by which the crime was committed and it ex-

tended no further and was no more extensive than necessary to uncover the articles sought. It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot, and it is not unlikely or unreasonable to assume that they would be found encased in an envelope where the draft cards and certificates were in fact discovered" (R. 149–150). While the court below considered the object of the search to be only the canceled checks, the record shows that the agents, in addition, were searching for burglar's tools, pens, and writing materials (pp. 6–7, *supra*).

The burglars' tools, like the checks, would probably not have been in open view; the pens and the writing materials may or may not have been. The decided cases indicate, on closer analysis, that neither the lawfulness of the search nor that of the seizure turns on whether the articles taken were in plain view.[29] In either event, the pens and writing

[29] The ledger in the *Marron* case was in a locked closet. See note 13, *supra*, p. 33. Yet it was later referred to by this Court as having been "visible" (282 U. S. at 358) and "in plain view" (285 U. S. at 465). Contrariwise, some of the papers taken in the *Lefkowitz* case were in waste-baskets (285 U. S. at 460), from which they were taken and later pasted together, yet both the search and the seizure were condemned. And compare *Furlong* v. *United States*, 10 F. 2d 492 (C. C. A. 8), which upheld the seizure of a marked bill taken from the closed drawer of a cash register.

materials were subject to seizure; they were, as previously stated (*supra*, pp. 72–73), a part of the outfit used to forge the $25,000 check, so that, even if their seizure resulted from a search they were, for the same reason, the proper objects of a search.

This Court observed in the *Go-Bart* case (282 U. S. at 357), "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

If the officers here had been searching for an automobile, stolen and transported in violation of the National Motor Vehicle Theft Act (18 U. S. C. 408), it would obviously have been unreasonable for them to have searched defendant's bureau drawers. The same must be said of a search for an unregistered still, possessed in violation of 26 U. S. C. 2810 (a). But where, for instance, the search is carried on for plates used to counterfeit government obligations (18 U. S. C. 264, 267), articles more easily concealed, the number of likely hiding places is greater, and the scope of a reasonable search is accordingly wider. When the articles sought to be uncovered are even smaller—counterfeit silver coins (18 U. S. C. 277), gold coins of any sort (31 U. S. C. 443), opium or other narcotics (26 U. S. C. 3224 (c); 21 U. S. C. 174)—a search to avail at all must be even more thorough. And when the object of the quest is, for example, smuggled diamonds

(19 U. S. C. 1593), then even a search as painstaking as the one disclosed by this record might well be wholly inadequate. In any event, a search otherwise reasonable does not merit constitutional condemnation simply because it is thorough. A search predestined to failure is not the only one that satisfies the Fourth Amendment.

In summary, we submit that the search here was not unlawful as a quest for evidence of guilt. The avowed objects of the present search were instrumentalities of the crimes for which petitioner was arrested or the means of committing those crimes, and the nature of most of them was such that they could not be discovered without a thorough examination of the apartment. Cf. *Matthews* v. *Correa*, 135 F. 2d 534 (C. C. A. 2).

III

THE SEARCH WAS NOT IMPROPER BECAUSE IT EXTENDED BEYOND THE PRECISE PORTION OF THE PREMISES WHERE PETITIONER WAS ARRESTED

Petitioner contends (Pet. 4, 15, 21–26) that when he was arrested the search could only extend to "whatever [was] found upon his person and in his immediate control." Under this head, petitioner devotes himself to an attack upon the statement in the opinion below that "when a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense, may be seized and held as

evidence in a prosecution against him" (R. 147–148). Petitioner discusses each of the cases cited in the opinion to support this statement, and concludes that the statement must be modified by inserting before the word "control," the word "immediate." Just how the modification sought affects the case, petitioner does not state. We will here assume that petitioner's contention, in effect, is that where the arrest takes place in a room in an apartment, any search must be limited to that room and may not be extended to other rooms of the apartment. Here, petitioner was arrested in the living room of his apartment, and the search covered that room and the other three rooms of the apartment (p. 7, *supra*).

The cases in this Court indicate that, if the search is otherwise lawful, it may extend to the entire premises under the control of the arrested person. Thus, in the *Agnello* case, the Court said that incident to a lawful arrest there was the right "to search the place where the arrest is made." 269 U. S. at 30. The premises there consisted of four rooms, and the agent testified that he "searched all around the place."* That portion of the search was held lawful; the search of premises other than those on which the arrest took place was held unreasonable. See pp. 23–24, *supra*. Similarly, in the *Marron* case, in speaking of searches incident to a lawful arrest, the

* R. 61, 219; No. 6, Oct. T. 1925.

Court said that the officers had the right to search "the place"; that while the ledger was not on the prisoner's person "at the time of his arrest, it was in his immediate possession and control"; and that the officers' authority to search "extended to all parts of the premises used for the unlawful purpose." 275 U. S. at 199. The premises involved in the *Marron* case consisted of six or seven rooms,[31] and the agents testified that they made a thorough search of the entire premises.[32]

In the *Go-Bart* case, 282 U. S. 344, the search extended to the three rooms of the suite occupied by the petitioners, and in *United States v. Lefkowitz*, 285 U. S. 452, the premises searched consisted of a single room divided into two portions by a partition. In each of these cases the search was held to be unreasonable, basically for the reason that it was exploratory in nature, seeking only generally incriminatory papers. Neither decision suggests that the area searched was too extensive, or that the search, otherwise reasonable, became unreasonable because more than one room was examined by the officers.

The circuit courts of appeal, accordingly, have assumed without discussion that the area of search is not limited merely to the room in which the

[31] R. 93, 119, 132, 137–138; No. 185, Oct. T. 1927.
[32] R. 92, 133, 137; No. 185, Oct. T. 1927.

arrest is made.[33] And while some of these decisions are not law today because they involve the species of exploratory searches condemned by the *Go-Bart* and *Lefkowitz* rulings,[34] they are in accord with the decisions of this Court as to the portions of the premises which the arresting officers may examine. As the Ninth Circuit said in the *Sayers* case (2 F. 2d at 147): "* * * if taken in commission of the crime in a building, the latter may be * * * searched to the extent that the offender's control and activities likely extended."

We think the rationale of the cases is that the premises under the arrested person's control may be searched because of the likelihood that he has there secreted the fruits and/or the instrumentalities of his crime. If he is arrested in a hotel room, that does not open to search all the other rooms of the hotel; they were not under his control. For the same reason, arrest of the defendant in his apartment does not subject to scrutiny

[33] E. g., *Swan* v. *United States*, 295 Fed. 921 (App. D. C.); *Sayers* v. *United States*, 2 F. 2d 146 (C. C. A. 9); *Marron* v. *United States*, 8 F. 2d 251 (C. C. A. 9); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 2); *Shelton* v. *United States*, 50 F. 2d 405 (C. C. A. 7); *United States* v. *71.41 Ounces Gold Filled Scrap*, 94 F. 2d 17 (C. C. A. 2); *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3); *Matthews* v. *Correa*, 135 F. 2d 534 (C. C. A. 2); *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. C. A. 2), certiorari denied, 323 U. S. 761.

[34] E. g., *Sayers* v. *United States*, 2 F. 2d 146 (C. C. A. 9); *United States* v. *Poller*, 43 F. 2d 911 (C. C. A. 9); cf. *Marron* v. *United States*, 8 F. 2d 251 (C. C. A. 9).

all the rest of the apartment house. But it does, we submit, render liable to search every room in his own apartment, and every room in his house if he occupies a detached dwelling. Certainly it would be highly artificial to restrict the area of the search to the particular portion of the premises where the arrest chances to take place.

Suppose that federal officers, armed with a warrant for the defendant's arrest on a charge of having stolen government property in his possession, are admitted by defendant's wife and arrest him in the kitchen.[*] We do not believe that in such a case the search, otherwise proper, must be limited to the kitchen. Or suppose that the defendant is arrested in the bathroom, or even in a clothes closet in which he had concealed himself; it certainly can not follow that only the bathroom or the closet may then be searched for the instrumentalities of his offense.

We submit, therefore, that, whenever a search of premises is permissible, such search manifestly extends to all portions of the premises under the control of the person arrested. In the present case the search did not extend beyond those portions. Hence it was reasonable, proper, and not an unwarranted extension of the right to search incident to a lawful arrest.

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[*] Distinguish the situation where the search precedes the defendant's entry and arrest. *United States* v. *Deegan*, 66 F. Supp. 511 (S. D. N. Y.).

IV

THE SEIZURE OF THE SELECTIVE SERVICE DOCUMENTS AND THEIR INTRODUCTION IN EVIDENCE WERE PROPER

The final question in the case is whether the agents were authorized to seize the eight Notice of Classification cards and the eleven Registration Certificates, petitioner's possession of which formed the basis of his conviction in the present case. The agents were not searching for these documents. They did not know when they embarked on the search that petitioner had the documents in his possession (R. 75–76, 85). Petitioner contends (Pet. 4–5, 15, 28–37, 38–40) that even if the search was proper, the seizure of the selective service documents was improper on the theory that a seizure must be limited to the offense for which the arrest is made and may not extend to articles accidentally discovered during the course of the search. We submit that the contention is without merit in so far as it relates to the seizure here involved.

There can be no doubt that it was unlawful for petitioner to have these documents in his possession. The Notice of Classification cards bore a stamped legend which it was improper for them to bear (R. 50–51, 133). Under the applicable Selective Service Regulation (Appendix, p. 94, *infra*), it was unlawful for petitioner to have these cards in his possession. As to the Registration Certificates, it is not disputed that they were

stolen government property. We submit that it was plainly proper for the agents to take the documents. As Mr. Justice Frankfurter stated in his dissent in *Zap* v. *United States*, No. 489, Oct. T. 1945, decided June 10, 1946 (dissent, slip opinion, p. 2):

> If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized.[36]

This view is supported by the decisions of this Court. *Steele v. United States (No. 1)*, 267 U. S. 498; see *Adams* v. *New York*, 192 U. S. 585, 598; cf. *Gouled* v. *United States*, 255 U. S. 298, 311-312; *Zap* v. *United States*, No. 489, Oct. T. 1945, decided June 10, 1946.

Thus, in *Steele* v. *United States* (*No. 1*), 267 U. S. 498, a search warrant authorized search of the premises for a number of cases believed to contain whiskey. Search disclosed, and the agents seized, not only 150 cases of whiskey, but also 92 kegs of whiskey, a 5-gallon can of alcohol, 66 cases of gin, six 5-gallon jugs of whiskey, 102 quarts of whiskey, two 50-gallon barrels of whiskey, and a corking machine. This Court held that the property was lawfully seized, and affirmed a decree holding that it should not be returned.

[36] Mr. Justice Frankfurter went on to state that it was an entirely different proposition "to seize for evidentiary use papers the possession of which involves no infringement of law."

Earlier, in *Adams* v. *New York, supra;* the Court had recognized the same principle. It said (192 U. S. at 598):

> The right to issue a search warrant to discover stolen property or the means of committing crimes, is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.[27]

Accordingly, it has been consistently held by the lower federal courts that where officers in the

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[27] *Marron* v. *United States*, 275 U. S. 192, is not to the contrary. There officers entered the premises under a search warrant authorizing them to search for liquor. In the course of their search, they took a ledger and some bills,

course of a lawful investigation come upon instrumentalities of a wholly different crime, such articles may also be seized. *Bennett* v. *United States*, 145 F. 2d 270 (C. C. A. 4), certiorari denied, 323 U. S. 788 (search warrant for counterfeiting apparatus justifies seizure of counterfeit ration coupons); *In re 14 East 17th Street*, 65 F. 2d 289 (C. C. A. 2) (smuggled goods discovered after entry by consent); *Paper* v. *United States*, 53 F. 2d 184 (C. C. A. 4) (liquor found during search for defendant whose arrest was sought on a bench warrant); *United States* v. *Two Soaking Units*, 48 F. 2d 107 (C. C. A. 2), certiorari denied, 284 U. S. 627 (contraband discovered during lawful inspection); *Hilsinger* v. *United States*, 2 F. 2d 241 (C. C. A. 6), certiorari denied, 266 U. S. 622 (same); *United States* v. *Jankowski*, 28 F. 2d 800 (C. C. A. 2) (liquor found in car being stopped to notify driver to fix headlights); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736 (C. C. A. 2) (seizure of 4867½ cases of various kinds of intoxicating liquor held proper under search warrant for 10 or 12 barrels of intoxicating liquor); *Milam* v. *United States*, 296 Fed. 629 (C. C. A. 4), certiorari denied, 265 U. S. 586 (aliens unlawfully in U. S. discovered in truck

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articles not in themselves offending. While the seizure of these papers was held to be not justified *under the warrant* (275 U. S. at 196, quoted *supra*, note 12, pp. 26-27), the seizure was found proper as incident to a lawful arrest for a crime then being committed on the premises. 275 U. S. at 198-199.

stopped on reasonable belief it was carrying liquor); *United States* v. *Charles*, 8 F. 2d 302 (N. D. Calif.) (liquor seized in course of search for narcotics); *United States* v. *Seltzer*, 5 F. 2d 364 (D. Mass.) (counterfeit bond strip label stamps seized in search for liquor); *United States* v. *Camarota*, 278 Fed. 388 (S. D. Calif.) (still seized in search for liquor).

The rationale of all these decisions is succinctly set out in expressions from but two of them. In the case of *United States* v. *Old Dominion Warehouse*, *supra*, Judge Learned Hand said (10 F. 2d at 738):

> If we suppose the case of goods which we are more used to thinking of as inherently contraband, like a burglar's kit, or counterfeiting paraphernalia, the case appears to us plain. We cannot suppose that, if an officer entered lawfully upon a warrant limited to certain described articles of this kind, he would not be justified in taking without warrant any others which he might chance upon in the premises. His seizure would not depend upon the warrant, but upon the fact that they were in their nature caput lupi; it would be as little an "unreasonable seizure" as to take property from a person arrested.

And in *Paper* v. *United States*, *supra*, Judge Parker for the Fourth Circuit stated the reasons as follows (53 F. 2d at 184–185):

We think there can be no question but that the evidence was admissible. The purpose of the Fourth Amendment was to prevent the use of "governmental force" to search a man's house, his person, his papers or his effects and to prevent their seizure against his will. *Olmstead* v. *U. S.*, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376. Most cases of search in violation of this constitutional provision involve the element of trespass, i. e. the entry without right upon the premises of the citizen. And all cases of unlawful search will be found to involve either this element or some element of fraud or subterfuge, as where an arrest is made a pretext for a search, or where the right to search having been obtained ostensibly for one purpose is used in reality for another. *Henderson* v. *U. S.* (C. C. A. 4th) (12 F. (2d) 528, 51 A. L. R. 420; *Thompson* v. *U. S.* (C. C. A. 4th) 22 F. (2d) 134. But where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of the citizen, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers, in this case, had discovered in the cellar a counterfeiting plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?

* * * * *

In this case the officers had the right to go upon the defendant's premises for the purpose of finding and arresting him. While lawfully there and searching for him in good faith for the purpose of making the arrest, and not as a pretext for searching the premises for evidence of crime, they discovered that a crime was being committed in their presence. This discovery did not render their search unreasonable or unlawful; and there is no reason in law or in common sense why their testimony as to the crime whose commission they discovered should be excluded. Courts should be careful to safeguard the constitutional rights of the citizen against unlawful infringement by overzealous officers of the law; but, where officers are proceeding lawfully, there is no constitutional principle which forbids their testifying to a violation of law which they observe. The purpose of the Fourth Amendment is not to shield crime, but to protect the citizen against the improper use of governmental force. If there is no such improper use of force, the amendment has no application.

It would indeed be a perversion of the law to hold that officers, while legally searching as incident to an arrest, may not seize unquestioned contraband property unexpectedly uncovered by their search. And, since the documents were lawfully obtained, they could, of course, be used to prosecute petitioner for an offense unrelated to that

upon which the search was founded. Cf. *Gouled v. United States*, 255 U. S. 298, 311–312.

CONCLUSION

The search here was a proper incident of a lawful arrest. It was not merely exploratory. In the circumstances it was reasonable, both as to purpose and scope. And the contraband articles it uncovered were properly seized even though otherwise unrelated to the crimes for which petitioner was arrested or to the articles for which search was made.

Accordingly, we respectfully submit that the judgment below should be affirmed.

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APPENDIX

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Search Warrant Act, Title XI of the Espionage Act of June 15, 1917, C. 30, 40 Stat. 228, 18 U. S. C. 611 *et seq.*, provides in pertinent part as follows:

> Sec. 2. A search warrant may be issued under this title upon either of the following grounds:
>
> 1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.
>
> 2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

Section 48 of the Criminal Code (18 U. S. C. 101) is as follows:

> Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has heretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is

> directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 3 of the National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, as amended by the Act of August 3, 1939, c. 413, § 1, 53 Stat. 1178 (18 U. S. C. 415) reads in pertinent part as follows:

> * * * whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both * * *.

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894–895 (50 U. S. C. App. 311), provides in pertinent part as follows:

> * * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

Section 623.61–2 of the Selective Service Regulations (7 F. R. 9773) reads as follows:

> It shall be a violation of these regulations for any person to have in his possession a Notice of Classification (Form 57) issued to some other person, or to permit a Notice of Classification (Form 57) issued to him to be in the possession of any other person, except as provided in the instructions upon such forms; or to falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or to willingly aid or assist another to falsely make, alter, forge, or counterfeit, any Notice of Classification (Form 57); or to utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, altered, forged, or counterfeited Notice of Classification (Form 57); or to exhibit or present to any person any such false, altered, forged, or counterfeited Notice of Classification (Form 57) knowing the same to be false, forged, altered, or counterfeited.

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